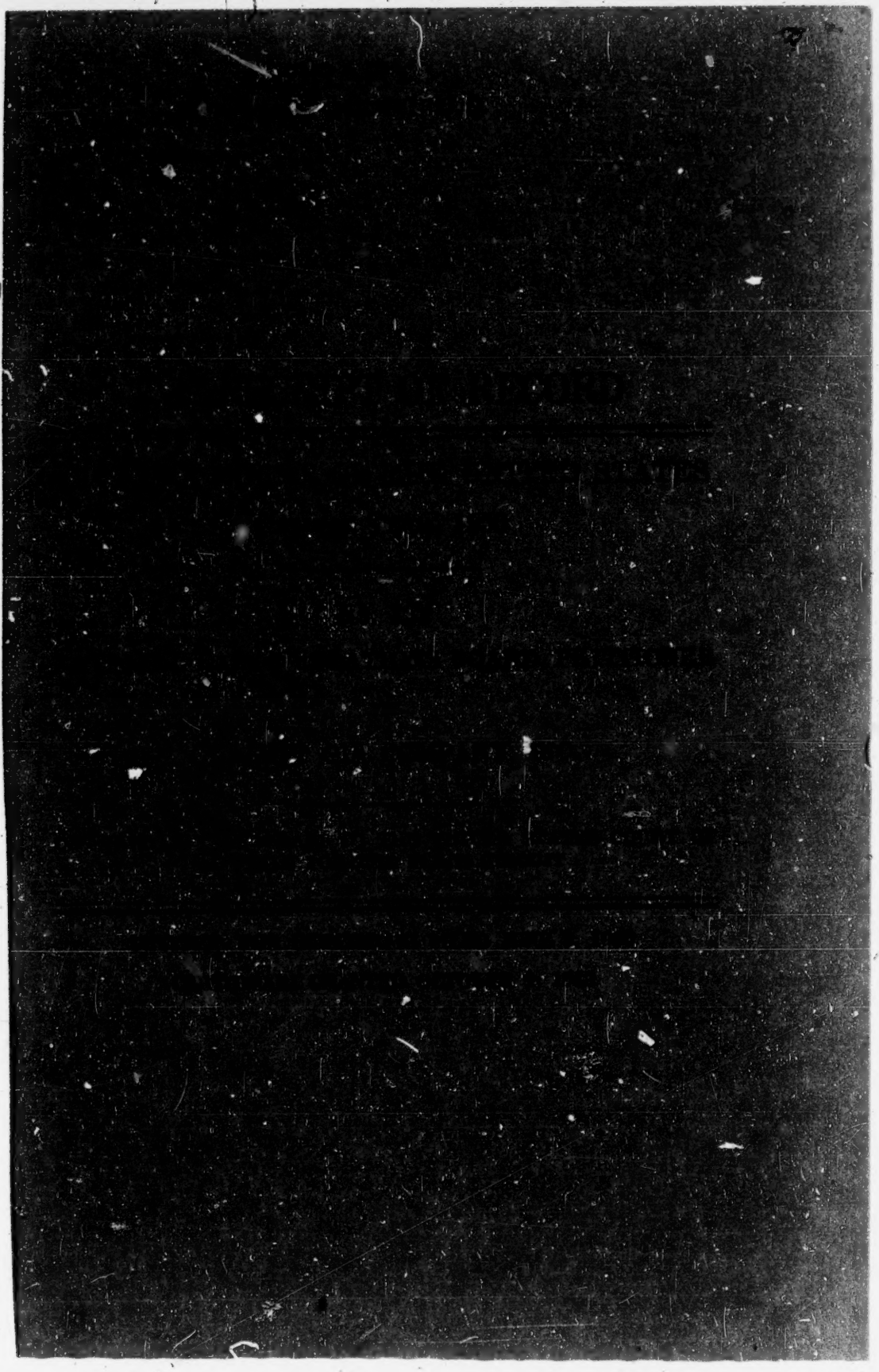

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 122

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

GULLETT GIN COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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1 In the United States Circuit Court of Appeals for the Fifth Circuit

No. 12798

GULLETT GIN COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Petition for review and to set aside order of National Labor Relations Board

Filed May 9, 1949

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

Gullett Gin Company, Inc. (hereinafter referred to as petitioner) respectfully petitions this Honorable Court for a review of a final order of the National Labor Relations Board (hereinafter referred to as the Board) in a proceeding instituted against petitioner, entitled on the records of the Board, "In the Matter of Gullett Gin Company, Inc., and Ellis W. Pechon", Case No. 15–CA–53.

In support of this petition, your petitioner respectfully shows:

I

Petitioner is a corporation organized under the laws of the State of Louisiana and engaged in the business of manufacturing cotton ginning machinery at its plant in Amite, Louisiana.

2 II

The order of the Board, as will be shown hereafter, alleges certain violations of Section 8 (a) (1) and 8 (a) (3) of the National Labor Relations Act, as amended (hereinafter referred to as the Act). These alleged violations are supposed to have occurred at respondent's manufacturing plant at Amite, Louisiana. Under the provisions of Section 10 (f) of the Act, 29 U. S. C. A., Sec. 160 (f), this Honorable Court has jurisdiction in the premises.

III

(a) On September 16, 1948, the Board issued a Complaint in the aforesaid case No. 15–CA–53. This Complaint will be found in the pleadings in this matter, marked for identification, General Counsel Exhibit 1–B.

(b) On September 28, 1948, the Board issued on Amended Complaint, which has been marked General Counsel Exhibit 1–E.

(c) On October 28, 1948, your petitioner, as respondent in the aforesaid case, No. 15–CA–53, filed an Answer which has been marked General Counsel Exhibit 1–I.

(d) On October 29, 1948, your petitioner filed an amendment to its Answer, which was marked General Counsel Exhibit 1–J.

(e) On October 29, 1948, in Amite, Louisiana, a Hearing in the aforesaid case, No. 15–CA–53, was duly held before Herman Marx, Trial Examiner of the National Labor Relations Board.

3 (f) On January 14, 1949, the aforesaid Herman Marx, Trial Examiner, issued his Intermediate Report in the aforesaid case.

IV

(a) Petitioner timely filed with the National Labor Relations Board certain Exceptions to the aforesaid Intermediate Report, and subsequently filed a Supplemental Exception to the Intermediate Report.

(b) Said Exceptions to the Intermediate Report, read as follows:

"1. To the finding that Jesse Autrer was absent from the meeting at the time of the discharge. P. 69, lines 19–22, and page 70, lines 1 and 2, and footnote 18.

"2. To the finding and evaluation that the employees were not given adequate opportunity to return to work, and that they were discharged because of their concerted activity, rather than because of their insubordination, p. 77, lines 22 and 23 and page 78, lines 1–7.

"3. To the finding of credibility of the testimony of the discharged employees, and the failure to find, by reason of the patent inconsistencies in their testimony, that their testimony was planned in concert and false on the material issues of fact. P. 79, footnote 28.

"4. To the finding of 'incompatibility' in the testimony of Wallace on the duration of the interval in which the employees had opportunity to answer his direction to return to work; and to the failure to find that Wallace did give the men ample opportunity to make their decision. P. 80, lines 11–18.

4 "5. To the finding that Deiterich's affidavit, given several months prior to the hearing, tends to 'refute his own testimony' given at the Hearing; and to the failure to give great weight and credence to the statements contained in said affidavit, made to a representative of the Board at a time unsuspicious. Pp. 79–84, and particularly from line 15 of p. 82 to line 5 of p. 83.

"6. To the inference that some of the employers would have made their decision known to Wallace if given sufficient time to do so in view of the fact that immediately after the discharge not

a single employee offered to work, or made any protest that they were not given sufficient time to arrive at a decision. P. 87, lines 1–16.

"7. To the finding that the testimony of Wallace and Dieterich is unreliable as to the second waiting period. P. 89, lines 24–29.

"8. To the finding that Wallace paused only momentarily after asking the men to arrive at a decision. P. 95, lines 11–16, and p. 96, line 1.

"9. To the inference that Wallace discharged the employees in a moment of 'impatience'. P. 96, lines 12, et seq. and footnote 48.

"10. To the finding that Wallace discharged the employees because he feared that they were going to strike. P. 96, lines 20–26, and p. 97, lines 1–8.

"11. To the finding that the discharge of Cutrer casts 'some light on Wallace's real motives'. P. 97, footnote 50.

5 "12. To the finding that this group of employees is a 'labor organization' within the meaning of the Act. Pp. 97–98, and footnotes 52, 54 and 55.

"13. To the findings of burdening of interstate commerce, and the engagement in unfair labor practices, and to the failure to find that respondent discharged these employees for legal, justifiable reasons. Pp. 100–103.

"14. To the 'Recommendations.' Pp. 103–105, and Appendix A." P. 106.

(c) Said Supplemental Exception to the Intermediate Report reads as follows:

"Respondent hereby amends and supplements said exception No. 14 to read as follows:

"'To the "Recommendations," pp. 103–105 and Appendix A, p. 106, and particularly to the language in the Intermediate Report, p. 101, lines 19–24, in that the Honorable Trial Examiner has failed to recommend that there be deducted from the back pay award for each employee such sums of money as have been received by each employee from the Louisiana Unemployment Compensation Fund; and further, in that the Honorable Trial Examiner has failed to recommend that there be deducted from the back pay award for each employee what he would have earned had he made reasonable effort to obtain other employment.'"

(d) In support of the aforesaid Exceptions to the Intermediate Report, petitioner filed a brief with the Board.

V

6 On April 21, 1949, the Board issued its Decision and Order in the matter, said Decision and Order reading as follows:

DECISION AND ORDER

"On January 14, 1949, Trial Examiner Herman Marx issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices in violation of Section 8 (a) (1) and (3) of the Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief, and later filed supplemental exceptions to the Intermediate Report.

"The Board [1] has reviewed the rulings of the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner insofar as they are consistent with this Decision and Order.

"The Trial Examiner found that the discharge of the 10 tin shop employees was in violation of Section 8 (a) (3) and 8 (a) (1) of the Act. The Trial Examiner concluded that, in part, the motivation of Superintendent Wallace in discharging these employees was his fear that they would strike if the wage demand they had gathered together to present met with no success. We do not believe that the record supports this inference. Rather we believe that in discharging the employees, Wallace was motivated entirely by the fact that these employees did not immediately accept his explanation of the reason for not granting the wage increase. Instead of summarily accepting the proffered explanation and immediately disbanding the meeting, the employees began to discuss the matter among themselves. It was this momentary hesitation which, in our view, provoked the discharges. Such concerted action under the circumstances of this case was not insubordination,[2] but was concerted activity for the mutual aid or protection of the employees involved, participation in which is protected by Section 7 of the Act. A discharge for having engaged in such activity violates Section 8 (a) (1) of the Act. Because such a discharge also amounts to a discrimina-

[1] Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this proceeding to a three-man panel consisting of the undersigned Board Members.

[2] Like the Trial Examiner, we find that nothing in Wallace's statements could reasonably be construed as an order that the men return to work immediately. However, in finding that the employees were not discharged for insubordination we, unlike the Trial Examiner, do not rely on any finding that employee Cutrer was absent at the time of the discharge. Assuming that the record supports a finding that he was absent, this fact becomes significant only if it were to further appear that Wallace knew that Cutrer was absent. The record will not support a finding that Wallace had such knowledge.

tion in hire and tenure of employment, thereby discouraging membership in a labor organization,[3] it violates Section 8 (a) (3) of the Act. Moreover, whether the discharge be regarded as
8 a violation of Section 8 (a) (1) or of Section 8 (a) (3) we find that it is necessary to order reinstatement and back pay, as recommended by the Trial Examiner, in order to effectuate the policies of the Act.

"2. The Trial Examiner accepted some evidence at the hearing as to the loss of earnings of the employees discriminatorily discharged and their efforts to seek employment elsewhere. The record, however, does not enable us to determine whether or to what extent there has been a willful loss of earnings of any of the complainants as of the time of the hearing.[4] We shall not require additional evidence at this time, however, since the parties may be able amicably to adjust the amount of back pay due upon the basis of facts disclosed when compliance with our Order is undertaken.[5]

"ORDER

"Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Gullett Gin Company, Inc., Amite, Louisiana, and its officers, agent, successors, and assigns, shall:

"1. Cease and desist from:

9 "(a) Discouraging membership in any labor organization of its employees, by discharging or refusing to reinstate or in any manner discriminating against them in regard to their hire and tenure of employment, or any term or condition of employment;

"(b) In any other manner, interfering with, restraining, or coercing its employees in the exercise of their right of self-organization, to form labor organizations, to bargain collectively through representatives of their own choosing and to engage in

[3] We adopt the Trial Examiner's finding that by gathering together to present a wage demand the employees constituted themselves a "labor organization" within the meaning of the Act. Matter of Ever Ready Label Corp., 54 N. L. R. B. 551; Matter of Duro Test Corporation, 81 N. L. R. B., No. 151.
Chairman Herzog dissents from the holdin' that this ad hoc grouping of employees comprised a "labor organization" within the meaning of Section 2 (5) of the Act, and would therefore find no violation of Section 8 (a) (3). He agrees, however, that Section 8 (a) (1) was violated and joins in the remedial Order.

[4] Respondent argued in its supplemental exceptions that any sums of money paid to the complainants from the Louisiana Unemployment Compensation Fund should be deducted from any back pay award the Board would grant. We have previously held that any money received by a discriminatorily discharged employee from a State unemployment fund shall not be regarded as earnings when compensatory back pay is awarded. Matter of Rockwood Stove Works, 63 N. L. R. B. 1297.

[5] This is without prejudice to the Respondent's right, in the event that this matter is not adjusted, to apply for leave to adduce additional evidence as to whether the complainants have willfully incurred a loss of earnings subsequent to the Respondent's discrimination against them. Matter of C. D. Beck and Company, 63 N. L. R. B. 1426; Matter of Detroit Gasket and Manufacturing Company, 78 N. L. R. B. 670.

concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization, as authorized in Section 8 (a) (3) of the amended Act, as guaranteed by Section 7 thereof.

"2. Take the following affirmative action which the Board finds will effectuate the policies of the Act.

"(a) Offer to Ellis W. Pechon, Van Buren Bennett, Corydon L. Pechon, J. W. Bankston, Leander Hayden, Elmer Hayden, Jesse J. Hayden, Carl E. Warren, Irving Branch, and Jesse Cutrer immediate and full reinstatement to their former or substantially equivalent positions [6] without prejudice to their seniority or other rights and privileges, and make each of them whole for any loss of pay he may have suffered by reason of the Respondent's discrimination against him by payment to him a sum of money equal to that which he normally would have earned as wages from May 13, 1948, the date of the Respondent's discrimination against him, to the date of the offer of reinstatement, less his net earnings [7] and less willful losses, if any, incurred by him during such period;

"(b) Post at its plant in Amite, Louisiana, copies of the notice attached hereto and marked Appendix A.[8] Copies of said notice to be furnished by the Regional Director for the Fifteenth Region after being duly signed by representatives of the Respondent shall be posted by Respondent immediately upon receipt thereof and maintained by it for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees customarily are posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by other material; and

"(c) Notify the Regional Director for the Fifteenth Region (New Orleans, Louisiana), in writing within ten (10) days from

---

[6] In accordance with the Board's consistent interpretation of the term, the expression "former or substantially equivalent position" is intended to mean "former position wherever possible, but if such position is no longer in existence, then to a substantially equivalent position." See Matter of The Chase National Bank of the City of New York, San Juan, Puerto Rico Branch, 65 N. L. R. B. 837.

[7] By "net earnings" is meant earnings less expenses, such as for transportation, room, and board, incurred by an employee in connection with obtaining work and working elsewhere, which would not have been incurred but for his unlawful discrimination and the consequent necessity of his seeking employment elsewhere. Matter of Crossett Lumber Company, 8 N. L. R. B. 440. Monies received for work performed upon Federal, State, county, municipal, or other work-relief projects shall be considered as earnings. Republic Steel Corporation v. N. L. R. B., 311 U. S. 7.

[8] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted before the words: "A DECISION AND ORDER" the words: "DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING."

the receipt of this order what steps respondent has taken to comply herewith.

"Signed at Washington, D. C., this 21st day of April 1949.

[SEAL] "PAUL M. HERZOG,
Chairman,
JOHN M. HOUSTON,
Member,
ABE MURDOCK,
Member,
National Labor Relations Board."

11 "Footnotes."

VI

The Board erred in entering its said Decision and Order of April 21, 1949, in that:

(a) The Board failed to sustain each and every one of the Exceptions and Supplemental Exception to the Intermediate Report of the Trial Examiner (except Exception No. 11) which Exceptions and Supplemental Exception are copied in extenso hereinabove, and are made part of this paragraph by reference.

(b) The Board failed to set aside the Recommended Order of the Trial Examiner in this matter, which order should have been set aside for the reason that it is contrary to the law and the evidence, and is arbitrary and capricious for the reasons set forth in the said Exceptions and Supplemental Exception.

(c) The Board found that the discharge of the employees in this matter "was motivated entirely by the fact that these employees did not immediately accept this (the plant superintendent's) explanation of the reason for not granting the wage increase" when such finding of fact is not supported by the evidence in the record.

(d) The Board, having erroneously found that the motivation for the discharge of these employees was the failure of them to immediately accept petitioner's explanation of why certain requested wage increases could not be granted, determined as a matter of law that such discharges violate Section 8 (a) (1) and 8 (a) (3) of the Act, when such a proposition is completely
12 unfounded in law, particularly in view of the failure by the Board to find that petitioner had any knowledge whatsoever of the existence of a "labor organization" among the ten employees discharged.

(e) The Board found that the action of the ten employees in this matter constituted them a "labor organization" under the Act. (Chairman Herzog, one of the three members of the Board

panel which issued this Decision and Order, dissented from the other two members on this finding.)

(f) The Board ordered the reinstatement, with back pay, of certain employees in order to "effectuate the policies of the Act," when such an order, upon the facts of this matter, will encourage and reward arbitrary, independent, irresponsible, unauthorized, and disruptive activities of employees, instead of promoting the friendly, peaceful and amicable adjustment of industrial disputes which might otherwise burden and obstruct interstate commerce.

Wherefore, Gullett Gin Company, Inc., petitioner, petitions this Honorable Court for a review of the aforementioned Decision and Order of the Board of April 21, 1949, in the proceedings entitled, "In The Matter of Gullett Gin Company, Inc., and Ellis W. Pechon," Case No. 15–CA–53, which Decision and Order are erroneous as above set forth, and petitioner respectfully prays that:

(a) The Board be directed to certify and deliver to this Honorable Court a transcript of the entire record of said proceedings before the Board; and

(b) Upon the filing of said transcript, this Honorable Court review the Decision and Order of the Board; and

13 (c) The said Decision and Order of the Board be set aside, and your petitioner, its officers, agents and representatives be relieved by a decree of this Honorable Court from any necessity of complying therewith; and

(d) This Honorable Court order the National Labor Relations Board to stay and all proceedings or efforts to enforce said Decision and Order, pending a review of this matter by this Honorable Court; and

(e) Petitioner be granted such additional relief as the law, equity and the nature of this case may require.

BALDWIN, HASPEL & MOLONY,
LAWRENCE A. MOLONY,
CONRAD MEYER, III,
By (Signed) L. A. MOLONY,
Attorneys for Gullett Gin Company, Inc.

STATE OF LOUISIANA,
Parish of Orleans.

Before me, the undersigned authority, a Notary Public duly commissioned and qualified within and for the Parish and State aforesaid, personally came and appeared:

Lawrence A. Molony, who, after being duly sworn, did depose and say:

That he is of counsel for petitioner in the above and foregoing petition; that he has prepared same; and that all of the allegations

contained therein are true and correct to the best of his knowledge, information and belief.

That he has served a copy of this petition on the National
14 Labor Relations Board, Washington, D. C., the Regional Director of the Fifteenth Region of the National Labor Relations Board in New Orleans, Louisiana, and Mrs. Mary Purser, Attorney for the charging individual, in Amite, Louisiana, by depositing a copy of this petition in the United States Mail addressed to each of them.

(Signed) L. A. Moloney.

Sworn to and subscribed before me on this 3d day of the month of May 1949.

(Signed) Conrad Meyer, III,
Notary Public.

In the United States Court of Appeals for the Fifth Circuit
[Title omitted.]

Order to file petition

Filed May 9, 1949

A petition for review of the Order of the National Labor Relations Board entered on April 21, 1949, in the proceedings entitled "In the matter of Gullett Gin Company, Inc., and Ellis W. Pechon", Case No. 15–CA–53, having been presented to this Court;

It Is Ordered That said petition be filed and docketed as of May 9, 1949; and
15 It Is Further Ordered That a copy of this Order and the said petition be forthwith served on the National Labor Relations Board, and that said Board, upon service of such copy, forthwith certify and file in this Court a transcript of the entire record of the aforesaid proceeding in conformity with Rule 38 of this Court.

New Orleans, Louisiana, this 6th day of May 1949.

(Signed) J. C. Hutcheson, Jr.,
United States Circuit Judge.

In the United States Court of Appeals for the Fifth Circuit

[Title omitted.]

Answer of National Labor Relations Board to Petition For Review of and to Set Aside Its Order and request for Enforcement of said order

Filed June 18, 1949

To the Honorable, the Judges of the United States Court of Appeals for the Fifth Circuit:

Comes now the National Labor Relations Board, herein called the Board, and pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. I, Secs. 141, et seq.), herein called the Act, files this answer to the petition for
16 review of and to set aside an order issued by the Board against Gullett Gin Company, Inc., petitioner herein, and the Board's request for enforcement of said order.

1. The Board admits the allegation contained in Part I of the Petition for Review.

2. Answering the allegations contained in Part II of the Petition for Review, the Board admits that this Court has jurisdiction to review its order. And further answering the allegations contained in said Part, the Board prays reference to the certified transcript of the record, filed herewith, of the proceedings heretofore had herein, for a full and exact statement of the pleadings, evidence, findings of fact, conclusions of law and order of the Board, and all other proceedings had in this matter.

3. Answering the allegations contained in Parts III, IV, and V of the Petition for Review, the Board prays reference to the certified transcript of the record, filed herewith, of the proceedings heretofore had herein, for a full and exact statement of the pleadings, evidence, findings of fact, conclusions of law and order of the Board, and all other proceedings had in this matter.

4. The Board denies each and every allegation of error contained in Part VI of the Petition for Review.

5. Further answering, the Board avers that the proceedings had before it, the findings of fact, conclusions of law, and order of the Board were and are in all respects valid and proper under the Act.

6. The Board respectfully requests this Court to deny the Petitioner's prayer that the Board's decision and order be set aside.

17 7. The Board, pursuant to Section 10 (e) of the Act, respectfully requests this Honorable Court for enforcement of its order issued against petitioner on April 21, 1949, in the proceedings designated on the records of the Board as Case

No. 15-CA-53, entitled: "In the Matter of Gullett Gin Company, Inc., and Ellis W. Pechon, an Individual."

In support of this request for enforcement of its order, the Board respectfully shows:

(a) Gullett Gin Company, Inc., a Louisiana Corporation, is engaged in business at Amite, Louisiana. This Court has jurisdiction of the Petition for Review herein and of the request for enforcement by virtue of Section 10 (e) and (f) of the Act.

(b) Upon proceedings had in said matter, as more fully shown by the entire record thereof, certified by the Board and filed with this Court herein, to which reference is hereby made, and including a complaint, answer, hearing for the purpose of taking testimony and receiving other evidence, trial examiner's report and exceptions thereto, the Board, on April 21, 1949, duly stated its findings of fact and conclusions of law and issued its order directed to petitioner and its officers, agents, successors, and assigns. The aforesaid order provides as follows:

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Gullett Gin Company, Inc., Amite, Louisiana, and its officers, agent, successors, and assigns, shall:

18 1. Cease and desist from:

(a) Discouraging membership in any labor organization of its employees, by discharging or refusing to reinstate or in any manner discriminating against them in regard to their hire and tenure of employment, or any term or condition of employment;

(b) In any other manner, interfering with, restraining, or coercing its employees in the exercise of their right to self organization, to form labor organizations, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in an labor organization, as authorized in Section 8 (a) (3) of the amended Act, as guaranteed by Section 7 thereof.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act.

(a) Offer to Ellis W. Pechon, Van Buren Bennett, Corydon L. Pechon, J. W. Bankston, Leander Hayden, Elmer Hayden, Jesse J. Hayden, Carl E. Warren, Irving Branch, and Jesse Cutrer

immediate and full reinstatement to their former or substantially equivalent positions [6] without prejudice to their seniority or other rights and privileges, and make each of them whole for any loss of pay he may have suffered by reason of the Respondent's
19 discrimination against him by payment to him a sum of money equal to that which he normally would have earned as wages from May 13, 1948, the date of the Respondent's discrimination against him, to the date of the offer of reinstatement, less his net earnings [7] and less willful losses, if any, incurred by him during such period;

(b) Post at its plant in Amite, Louisiana, copies of the notice attached hereto and marked Appendix A.[8] Copies of said notice to be furnished by the Regional Director for the Fifteenth Region after being duly signed by representatives of the Respondent shall be posted by Respondent immediately upon receipt thereof and maintained by it for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees customarily are posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by other material; and

(c) Notify the Regional Director for the Fifteenth Region (New Orleans, Louisiana), in writing within ten (10) days from the receipt of this order what steps respondent has taken to comply herewith.

(d) On April 21, 1949, the Board's Decision and Order was duly served upon the petitioner.

20 (d) Pursuant to Section 10 (e) and (f) of the Act, the Board has certified and filed with this Court a transcript of the entire record in the proceeding.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this answer and request for enforcement, and the filing of the certified transcript of the entire record in this proceeding, to be served upon petitioner, and that this Court take jurisdiction of the proceeding and of the questions to be determined therein and make and enter upon the pleadings, evidence, and proceedings set forth in the entire certified record of said proceedings, and upon the order set forth hereinabove,

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[6] In accordance with the Board's consistent interpretation of the term, the expression "former or substantially equivalent position" is intended to mean "former position wherever possible, but if such position is no longer in existence, then to a substantially equivalent position." See Matter of The Chase National Bank of the City of New York, San Juan, Puerto Rico Branch, 65 N. L. R. B. 837.

[7] By "net earnings" is meant earnings less expenses, such as for transportation, room, and board, incurred by an employee in connection with obtaining work and working elsewhere, which would not have been incurred but for his unlawful discrimination and the consequent necessity of his seeking employment elsewhere. Matter of Crossett Lumber Company, 8 N. L. R. B. 440. Monies received for work performed upon Federal, State, county, municipal, or other work-relief projects shall be considered as earnings. Republic Steel Corporation v. N. L. R. B., 311 U. S. 7.

[8] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted before the words: "A DECISION AND ORDER" the words: "DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING."

a-decree denying the petition to review and set aside and enforce in whole said order of the Board, and requiring petitioner and its officers, agents, successors, and assigns to comply therewith.

A. NORMAN SOMERS,
Assistant General Counsel,
National Labor Relations Board.

Dated at Washington, D. C., this 16th day of June 1949.

Appendix A

NOTICE TO ALL EMPLOYEES

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We will not discourage membership in any labor organization of our employees, by discharging or refusing to reinstate or in any other manner discriminating against them in regard to their tenure of employment or any term or condition of employment.

We will not in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection or to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the amended Act, as guaranteed by Section thereof.

We will offer to the employees below immediate and full reinstatement to their former or substantially equivalent positions without prejudice to any seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay suffered as a result of the discrimination: Ellis W. Pechon, Van Buren Bennett, Corydon L. Pechon, J. W. Bankston, Leander Hayden, Elmer Hayden, Jesse Hayden, Carl E. Warren, Irving Branch, Jesse Cutrer.

GULLETT GIN COMPANY, INC.,
Employer.

By _____
(Representative) (Title)

Dated _____.

22 This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[*Duly sworn to by A. Norman Somers; jurat omitted in printing.*]

23 Before National Labor Relations Board

Amended charge against employer

1. Pursuant to Section 10 (b) of the National Labor Relations Act, the undersigned hereby charges that Gullett Gin Company, Inc. (Name of employer) at _____ (Address of establishment)_____(Street) Amite (City) Louisiana (State) employing 229 (Number) workers in manufacturing cotton gins (Nature of business)has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) subsections (1) and 3 of said Act, in that:

2. On or about May 13, 1948, it, by its officers, agents, and representatives terminated the employment of J. W. Bankston, Van Buren Bennett, Elmer Hayden, Jesse J. Hayden, Leander Hayden, Irving Branch, Ellis W. Pechon, Corydon L. Pechon, Jesse Cutrer, and Carl E. Warren, because they engaged in concerted activities for the purpose of collective bargaining and other mutual aid and protection.

The undersigned further charges that said unfair labor practices are unfair labor practices affecting commerce within the meaning of said Act.

3. (Paragraphs 3, 4, and 5 apply only if the charge is filed by a labor organization.) The labor organization filing this charge, hereinafter called the union, has complied with Section 9 (f) (A), 9 (f) (B) (1), and 9 (g) of said Act as amended as evidenced by letter of compliance issued by the Department of Labor and

24 bearing code number _____. The financial data filed with the Secretary of Labor is for the fiscal year ending _____. A certificate has been filed with the National Labor Relations Board in accordance with Section 9 (f) (B) (2) stating the method employed by the union in furnishing to all its members copies of the financial data required to be filed with the Secretary of Labor.

4. Each of the officers of the union has executed a non-Communist affidavit as required by Section 9 (h) of the Act.

5. Upon information and belief, the national or international labor organization of which this organization is an affiliate or constituent unit has also complied with Section 9 (f), (g), and (h) of the Act.

6. ---------- (Full name of labor organization, including local name and number, or person filing charge) ---------- (Address) (Street) (City) (State) ---------- (Telephone number).

7. ---------- (Full name of national or international labor organization of which it is an affiliate or constituent unit) ---------- (Address) (Street) (City) (State) ---------- (Telephone number).

Do Not Write in This Space.

Case No. 15–CA–53.

Date filed July 2, 1948.

25 9 (f), (g), (h) cleared ----------

By Ellis W. Pechon.
ELLIS W. PECHON.
(Signature or representative or person filing charge)

(Title, if any)

Subscribed and sworn to before me this 1 day of July 1948, at Amite, La., as true to the best of deponent's knowledge, information and belief.

[SEAL]

MARY PURSER,
Notary Public.

(Submit Original and Four Copies of this Charge).

Before the National Labor Relations Board, Fifteenth Region

Case No. 15–CA–53

IN THE MATTER OF GULLETT GIN COMPANY, INC., AND ELLIS W. PECHON

Complaint

It having been charged by Ellis W. Pechon, an individual, that Gullett Gin Company, Inc. (herein called the respondent) has engaged in and is now engaging in certain unfair labor
26 practices affecting commerce as set forth and defined in the National Labor Relations Act, 49 Stat. 449, as amended by Public Law 101, 80th Congress, first session, Chapter 120 (herein called the Act), the General Counsel of the National Labor Relations Board on behalf of the National Labor Relations Board (herein called the Board) has caused the Regional Director for

the Fifteenth Region as agent for the Board, designated by the Board's Rules and Regulations, Series 5, Section 203.15, to issue this Complaint and allege as follows:

I

The respondent, Gullett Gin Company, Inc., is and at all times hereinafter mentioned was, a corporation duly organized under and existing by virtue of the laws of the State of Louisiana.

II

Respondent is engaged in the manufacture, sale, and distribution of cotton gin machinery at Amite, Louisiana.

III

The respondent in the course and conduct of its business operations during the year 1948, purchased raw materials from other States in excess of $100,000. During the same period, the respondent manufactured and sold finished products, valued in excess of $100,000, which was sold and shipped to customers outside the State of Louisiana.

IV

Respondent on or about May 13, 1948, discharged Ellis W. Pechon, Van Buren Bennett, Corydon L. Pechon, J. W.
27 Bankston, Jesse J. Hayden, Leander Hayden, Carl E. Warren, Jesse Cutrer, and Irvin Branch and thereafter failed and refused to reinstate them.

V

The respondent discharged and failed and refused to reinstate the said above employees enumerated in paragraph IV because they engaged in concerted activities for the purpose of collective bargaining and other mutual aid and protection.

VI

Respondent, by acts described in paragraphs IV and V above, did discriminate and is discriminating in regard to the hire and tenure of employment of the above said employees, and thereby did engage in, and is engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

VII

The respondent, by the acts described in paragraphs IV and V above, and by each of said acts, did interfere with, restrain

and coerce said above employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby did engage in, and is engaging in, unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

VIII

The activities of the respondent as set forth in paragraphs V and VI above, occurring in connection with the operations
28 of the respondent described in paragraphs I, II, and III, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

IX

The acts of the respondent described above constitute unfair labor practices affecting commerce within the meaning of Section 8 (a) (1) and (3) and Section 2 (6) and (7) of the Act.

Wherefore, on this 16th day of September 1948, the General Counsel of the National Labor Relations Board, on behalf of the Board, has caused the Regional Director for the Fifteenth Region to issue this Complaint against Gullett Gin Company, Inc. respondent herein.

John F. LeBus,
JOHN F. LEBUS,
Regional Director.

Before the National Labor Relations Board, Fifteenth Region

Case No. 15–CA–53

IN THE MATTER OF GULLETIN GIN COMPANY, INC., AND ELLIS W. PECHON

Notice of Hearing

Please take notice that on the 27th day of October 1948, at ten o'clock in the forenoon, Courtroom, Parish Courthouse,
29 Amite, Louisiana, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the Complaint attached hereto, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

A copy of the Charge upon which the Complaint is based is attached hereto.

You are further notified that, pursuant to Section 203.20 of the Board's Rules and Regulations, you shall file with the undersigned Regional Director, acting in this matter as agent of the National

Labor Relations Board, an answer to the said Complaint within ten (10) days from the service thereof and that unless you do so all the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board.

In Witness Whereof the General Counsel of the National Labor Relations Board, on behalf of the Board, has caused this Complaint and Notice of Hearing to be signed by the Regional Director for the Fifteenth Region on this 16th day of September 1948.

John F. LeBus,
JOHN F. LEBUS,
Regional Director, 15th Region,
National Labor Relations Board.

3d Floor, 1539 Jackson Avenue, New Orleans 13, Louisiana (Address).

Before the National Labor Relations Board, Trial Examiner Division

Washington, D. C.

Case No. 15-CA-53

IN THE MATTER OF GULLETT GIN COMPANY, INC., AND ELLIS W. PECHON

Order designating Trial Examiner

It is hereby ordered that Herman Marx act as Trial Examiner in the above case and perform all the duties and exercise all the powers granted to trial examiners under the Rules and Regulations—Series 5, as amended, of the National Labor Relations Board.

Dated, Washington, D. C., October 29, 1948.

[SEAL]

George Bokat,
GEORGE BOKAT,
Acting Chief Trial Examiner.

(Affidavit omitted.)

* * * * *

(Return receipts omitted.)

* * * * *

31 Before the National Labor Relations Board,
Fifteenth Region

Case No. 15–CA–53

IN THE MATTER OF GULLETT GIN COMPANY, INC. AND ELLIS W. PECHON

Amendment to complaint

A Complaint having been issued in this matter on the 16th day of September 1948 wherein Paragraph IV reads as follows:

"Respondent on or about May 13, 1948, discharged Ellis W. Pechon, Van Buren Bennett, Corydon L. Pechon, J. W. Bankston, Jesse J. Hayden, Leander Hayden, Carl E. Warren, Jesse Cutrer, and Irvin Branch and thereafter failed and refused to reinstate them."

Paragraph IV of the Complaint herein is amended to read as follows:

"Respondent on or about May 13, 1948, discharged Ellis W. Pechon, Van Buren Bennett, Corydon L. Pechon, J. W. Bankston, Jesse J. Hayden, Leander Hayden, Carl E. Warren, Jesse Cutrer, Irvin Branch, and Elmer Hayden and thereafter failed and refused to reinstate them."

Wherefore, on this 28th day of September 1948, the General Counsel of the National Labor Relations Board, on behalf
32 of the Board, has caused the Regional Director for the Fifteenth Region to issue this Amendment to the Complaint heretofore issued on the 16th day of September 1948 against Gullett Gin Company, Inc., respondent herein.

John F. LeBus
JOHN F. LEBUS,
Regional Director National Labor Relations Board, Fifteenth Region.

(Affidavit omitted.)

* * * * *

(Return receipts omitted.)

* * * * *

Before the National Labor Relations Board, Fifteenth Region

Case No. 15–CA–53

IN THE MATTER OF GULLETT GIN COMPANY, INC., AND ELLIS W. PECHON

Order postponing hearing

It is hereby ordered that the hearing in the above-entitled matter be and the same hereby is postponed from the 27th day

of October 1948 to the 29th day of October 1948 at the same time and place.

33 Dated at New Orleans, Louisiana, this 19th day of October, 1948.

C. Paul Barker,
C. PAUL BARKER,
Acting Regional Director, 15th Region,
National Labor Relations Board.

(Affidavit omitted.)

* * * * *

(Return receipts omitted.)

* * * * *

Before the National Labor Relations Board, Fifteenth Region

Case No. 15-CA-53

In the Matter of GULLETT GIN COMPANY, INC., AND ELLIS W. PECHON

Answer

I

Respondent admits the allegations of Paragraph I of the complaint.

II

34 Respondent admits the allegations of Paragraph II of the complaint.

III

Respondent admits the allegations of Paragraph III of the complaint.

IV

Respondent denies the allegations of Paragraph IV of the complaint as amended, except that Respondent admits that the individuals named therein are no longer in Respondent's employ.

V

Respondent denies the allegations of Paragraph V of the complaint.

VI

Respondent denies the allegations of Paragraph VI of the complaint.

VII

Respondent denies the allegations of Paragraph VII of the complaint.

VIII

Respondent denies the allegations of Paragraph VIII of the complaint.

35

IX

Respondent denies the allegations of Paragraph IX of the complaint.

Wherefore, Respondent prays that this complaint be dismissed.

BALDWIN, HASPEL & MOLONY,
By L. A. MOLONY,
Attorneys for Gullett Gin Co. Inc., Respondent.

1108 Richards Building, New Orleans, Louisiana.

[*Duly sworn to by L. A. Molony; jurat omitted in printing.*]

36 Before the National Labor Relations Board,
Fifteenth Region

Case No. 15-CA-53

IN THE MATTER OF GULLETT GIN COMPANY, INC. AND ELLIS W. PECHON

Amendment to answer of respondent

I

An answer having been filed in this matter by Respondent on October 28, 1948, wherein Paragraph V reads as follows:

"Respondent denies the allegations of Paragraph V of the complaint."

Respondent now amends its said answer so that Paragraph V thereof will read as follows:

"Respondent denies the allegations of Paragraph V of the complaint and avers that on or about May 10, the spokesman for complainants did confer with the Superintendent of Respondent Company, requesting a wage increase for the complainants. Said Superintendent informed the spokesman that it was not possible to grant a wage increase since two Unions were at the time petitioning for an election, each claiming to represent all employees in the plant including complainant, and he could not grant an increase.

37 "On or about May 13 said Superintendent was again requested to come to the Sheet Metal Shop where complainants were working and upon arriving at the shops he was told the men were not satisfied with his previous statement to the spokesman and they wanted a wage increase. The Superintendent reiterated that since two Unions were petitioning for an election, each claiming to represent all employees including complainant, he could not grant an increase as that would be a violation of the law. He directed complainants to return to their jobs or to leave the plant. As the men continued to sit around and do nothing and indicated an unwillingness to return to their jobs, he then informed them they were discharged and would proceed to replace them.

"The reason for the said discharge was not as alleged by the complainants herein, but because of insubordination in refusing to work and for an illegal strike for an illegal objective."

Wherefore, this 29th day of October 1948, Respondent, The Gullett Gin Co., Inc., requests that this, its supplemental and amended answer be filed herein and that its original answer be amended accordingly and that the complaint herein against it be dismissed.

BALDWIN, HASPEL & MOLONY,
By L. A. MOLONY,
Attorneys for Gullett Gin Co. Inc., Respondent.

1106 Richards Building, New Orleans, Louisiana.

38 [COPY]

NEW ORLEANS 13, LA.,
November 6, 1948

CHIEF TRIAL EXAMINER,
National Labor Relations Board,
Rochambeau Bldg., 815 Connecticut Ave.,
Washington, D. C.

Re: Gullett Gin Company and Ellis W. Pechon et als., Docket No. 15-CA-53. Respondents brief due thirteenth. No brief yet received from Board. Due to this fact and extensive record would appreciate extension of ten days to November twenty-third for filing of company brief.

L. A. MOLONY.

NOVEMBER 8, 1948.

C. PAUL BARKER,
Chief Legal Officer, 1539 Jackson Avenue, 3d Floor, New Orleans 13, La.
L. A. MOLONY,
1108 Richards Building, New Orleans, La.
MARY PURSER,
Guaranty Bank Bldg., Amite, La.

Re: Gullett Gin Company, Case No. 15–CA–53. At request of counsel for respondent time to file briefs is hereby extended to November 23.

WILLIAM R. RINGER,
Chief Trial Examiner.

39 [COPY]

NOVEMBER 19, 1948.

CHIEF TRIAL (sic) EXAMINER,
National Labor Relations Board, Rochambeau Bldg., 815 Connecticut Ave., Washington, D. C.

Re Gullett Gin Company and Ellis W. Pechon et als., Docket No. 15–CA–53. Respondents brief due twenty-third, brief near completion, because of expected delays in mimeographing would appreciate extension of time for filing until November twenty-ninth.

L. A. MOLONY.
11–22–48.

[COPY]

HERMAN MARKS,
Trial Examiner, care of William R. Ringer, Chief Trial Examiner, NLRB WA.

Re Gullett Gin Co., 15–CA–53. Request extension of time until November 30 for filing brief with Trial Examiner this matter.

C. PAUL BARKER,
Chief Law Officer.

40 [COPY]

C. PAUL BARKER, NOVEMBER 22, 1948.
Chief Legal Officer,
1539 Jackson Ave., 3d Floor, New Orleans 13, La.
L. A. MOLONY,
1108 Richards Bldg., New Orleans, La.
MARY PURSER,
Guaranty Bank Bldg., Amite, La.

Re Gullett Gin Company, Case No. 15–CA–53. At request of Counsel for Respondent, time to file briefs is hereby further extended to November 29.

WILLIAM R. RINGER,
Chief Trial Examiner.

41 Before the National Labor Relations Board, Division of Trial Examiners

Washington, D. C.

Case No. 15-CA-53

IN THE MATTER OF GULLETT GIN COMPANY, INC. and ELLIS W. PECHON

Order to show cause

The undersigned Trial Examiner having heard the testimony in the above cause, and it appearing to him that the record of the testimony was not correctly transcribed in the particulars set out below;

It is hereby ordered that the General Counsel, the Respondent, and Ellis W. Pechon show cause in writing on or before December 7, 1948, why the following changes should not be made in the official transcript of proceedings held on October 29, 1948:

Page 76, line 20, "litigation" to be changed to "mitigation."

Page 133, line 14, "litigation" to be changed to "mitigation of."

Page 135, line 5, "litigation" to be changed to "mitigation."

42 Page 152, line 7, "buy" to be changed to "by."

Page 218, line 14, "letter" to be changed to "copy."

Page 219, line 5, "We" to be changed to "He."

And it is further ordered that this order may be served upon the parties mentioned by sending copies by mail to counsel who appeared for them in the said proceedings and that objections to, or agreement with, some or all of the proposed changes may be furnished by mail in writing to the said Trial Examiner on or before the date specified for the same above.

Herman Marx,
HERMAN MARX,
Trial Examiner.

Dated: November 29, 1948.

(Affidavit omitted.)

* * * * *

Before the National Labor Relations Board, Division of Trial Examiners

Washington, D. C.

Case No. 15-CA-53

IN THE MATTER OF GULLETT GIN COMPANY, INC. AND ELLIS W. PECHON

Order correcting record

The undersigned Trial Examiner having issued an Order dated November 29, 1948, requiring the General Counsel,
43 Respondent, and Charging Party to show cause in writing on or before December 7, 1948, why the transcript of the record in the above proceeding should not be corrected in the manner and forms set forth in said Order; and said Order having been duly served upon counsel for the General Counsel, Respondent and Charging Party by mail, and no objections or other cause having been shown why such corrections should not be made; and good cause therefor appearing;

It is hereby ordered that the said corrections and changes, as set forth in the said Order dated November 29, 1948, be, and the same hereby are, made, and that changes may be made in the original and copies of the said transcript to the extent of, and in the manner and form set forth in said Order dated November 29, 1948.

Herman Marx,
HERMAN MARX,
Trial Examiner.

Dated: December 13, 1948.
(Affidavit omitted.)

* * * * *

44 Before the National Labor Relations Board

Case No. 15-CA-53

In the Matter of GULLETT GIN COMPANY INC. and ELLIS W. PECHON

Order transferring case to the National Labor Relations Board

A hearing in the above-entitled case having been held before a duly designated Trial Examiner and the Intermediate Report of the said Trial Examiner, a copy of which is annexed hereto, having been filed with the Board in Washington, D. C.

It is hereby ordered, pursuant to Section 203.45 of National Labor Relations Board Rules and Regulations, Series 5, that the above-entitled matter be, and it hereby is, transferred to and continued before the Board.

Dated: Washington, D. C., January 14, 1949.

By direction of the Board:

FRANK M. KLEILER,
Executive Secretary.

NOTE.—Communications concerning compliance with the Intermediate Report should be with the Director of the Regional Office issuing the complaint.

Your attention is specifically directed to the concluding paragraph of the Intermediate Report in respect to your
45 right to file exceptions, briefs, and to request oral argument. Please note that exceptions and brief must be filed as separate documents.

(Affidavit omitted.)

* * * * *

[COPY]

FEBRUARY 3, 1949.

NATIONAL LABOR RELATIONS BOARD,
Rochambeau Bldg.

Case No. 15–CA–53. Counsel for Respondent request five-day extension until February ninth within which to file exceptions and brief to intermediate report No. 1773.

BALDWIN, HASPEL & MOLONY.

46 National Labor Relations Board

N. L. R. B.

CMM:LK

2/7/49.

JOHN F. LEBUS,
Director, N. L. R. B., New Orleans.

BALDWIN, HASPEL & MOLONY,
Att: L. A. Malony & Conrad Meyer III, 1108 Richards Bldg., New Orleans, Louisiana.

MARY PURSER,
Guaranty Bank Building, Amite, Louisiana.

Re Gullett Gin Co., 15–CA–53, time for filing exceptions and briefs extended to February 9, 1949.

NATIONAL LABOR RELATIONS BOARD.

47 Before the National Labor Relations Board,
Fifte'nth Region

Case No. 15–CA–53

IN THE MATTER OF GULLETT GIN COMPANY, INC., AND ELLIS W. PECHON

Exceptions to the intermediate report

The undersigned counsel for Gullett Gin Company, Inc., Respondent in the above-entitled matter, hereby file the following exceptions to the Intermediate Report of the Honorable Herman Marx, Trial Examiner, issued on January 14, 1949, and transferred to the National Labor Relations Board on January 14, 1949:

1

To the finding that Jesse Cutrer was absent from the meeting at the time of the discharge. P. 69, lines 19–22, and page 70, lines 1 and 2, and footnote 18.

2

To the finding and evaluation that the employees were not given adequate opportunity to return to work, and that they were discharged because of their concerted activity, rather than because of their insubordination: P. 77, lines 22 and 23, and page 78, lines 1–7.

48

3

To the finding of credibility of the testimony of the discharged employees, and the failure to find, by reason of the patent inconsistencies in their testimony, that their testimony was planned in concert and false on the material issues of fact. Pp. 79, footnote 28.

4

To the finding of "incompatibility" in the testimony of Wallace on the duration of the interval in which the employees had opportunity to answer his direction to return to work; and to the failure to find that Wallace did give the men ample opportunity to make their decision. P. 80, lines 11–18.

5

To the finding that Dietrich's affidavit, given several months prior to the Hearing, tends to "refute his own testimony" given at the Hearing; and to the failure to give great weight and cre-

dence to the statements contained in said affidavit, made to a representative of the Board at a time unsuspicious, Pp. 79–84, and particularly from line 15 of p. 82 to line 5 of p. 83.

6

To the inference that some of the employees would have made their decision known to Wallace if given sufficient time to do so, in view of the fact that immediately after the discharge not a single employee offered to work, or made any protest that they were not given sufficient time to arrive at a decision. P. 87, lines 1–16.

49 7

To the finding that the testimony of Wallace and Dieterich is unreliable as to the second waiting period. P. 89, lines 24–29.

8

To the finding that Wallace paused only momentarily after asking the men to arrive at a decision. P. 95, lines 11–16, and p. 96, line 1.

9

To the inference that Wallace discharged the employees in a moment of "impatience". P. 96, lines 12 et seq. and footnote 48.

10

To the finding that Wallace discharged the employees because he feared that they were going to strike. P. 96, lines, 20–26, and p. 97, lines 1–8.

11

To the finding that the discharge of Cutrer casts "some light on Wallace's real motives." P. 97, footnote 50.

12

To the finding that this group of employees was a "labor organization" within the meaning of the Act, pp. 97–98, and footnotes 52, 54, and 55.

50 13

To the findings of burdening of interstate commerce, and the engagement in unfair labor practices, and to the failure to find that respondent discharged these employees for legal, justifiable reasons. Pp. 100–103.

14

To the "Recommendations," pp. 103–105, and Appendix A, p. 106.

BALDWIN, HASPEL & MOLONY,
LAWRENCE A. MOLONY,
CONRAD MEYER, III,
By L. A. MOLONY,
Attorneys for Gullett Gin Company, Inc., Respondent.

I hereby certify that a copy of these Exceptions have been served on opposing Counsel by depositing same in the United States Mails this date, addressed to: C. Paul Barker, Chief Law Officer, Fifteenth Region, N. L. R. B., 1539 Jackson Avenue, New Orleans, La.; Miss Mary Purser, Attorney-in-law, Amite, Louisiana.

L. A. MOLONY.

FEBRUARY 9, 1949.

51 Before the National Labor Relations Board

No. 15–CA–53

IN THE MATTER OF GULLETT GIN COMPANY, INC. AND ELLIS W. PECHON

Supplemental exceptions to intermediate report No. 1173

On or about February 9, 1949, the undersigned counsel, on behalf of Gullett Gin Company, Inc., Respondent in the above entitled and numbered matter, filed with the National Labor Relations Board certain exceptions to the Intermediate Report in the above entitled matter, together with a brief in support of said exceptions; Respondent now desires to supplement said exceptions and prays that the Board accept this supplemental exception and consider same:

I

Exception No. 14 of the document previously filed in this matter by Respondent reads as follows:

"To the 'Recommendations,' pp. 103–105, and Appendix A," p. 106.

II

Respondent hereby amends and supplements said exception No. 14 to read as follows:

52 "To the 'Recommendations,' pp. 103–105 and Appendix A, p. 106, and particularly to the language in the Intermedi-

ate Report, p. 104, lines 19–24, in that the Honorable Trial Examiner has failed to recommend that there be deducted from the back pay award for each employee such sums of money as have been received by each employee from the Louisiana Unemployment Compensation Fund; and further, in that the Honorable Trial Examiner has failed to recommend that there be deducted from the back pay award for each employee what he would have earned had he made reasonable effort to obtain other employment."

Wherefore, Respondent prays that this supplemental and amended exception be received by the Board; that it be considered together with the exceptions previously filed by Respondent in this matter, and that the Board dismiss this complaint in its entirety; and in the event and only in the event that the Board should find that the said employees are entitled to back pay, that there be deducted from the back pay award such sums of money as each of the employees has already received from the Louisiana Unemployment Compensation Fund and such other sums as each employee would have obtained had he made reasonable effort to obtain other employment.

Respectfully submitted.

BALDWIN, HASPEL & MOLONY,
LAWRENCE A. MOLONY,
CONRAD MEYER, III.,
L. A. MOLONY,
Attorneys for Gullett Gin Company, Inc., Respondent.

FEBRUARY 25, 1949.

53 I hereby certify that a copy of these exceptions has been served on opposing counsel by depositing same in the United States Mails this date, addressed to: C. Paul Barker, Chief Law Officer, Fifteenth Region, N. L. R. B., 1539 Jackson Avenue, New Orleans, La.; Miss Mary Purser, Attorney-at-Law, Amite, Louisiana.

L. A. MOLONY.

Before the National Labor Relations Board

Case No. 15–CA–53

IN THE MATTER OF GULLETT GIN COMPANY, INC., AND ELLIS W. PECHON, AN INDIVIDUAL

Decision and order

On January 14, 1949, Trial Examiner Herman Marx issued his Intermediate Report in the above-entitled proceeding, finding

that the Respondent had engaged in and was engaging in certain unfair labor practices in violation of Section 8 (a) (1) and (3) of the Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate
54 Report and a supporting brief, and later filed supplemental exceptions to the Intermediate Report.

The Board[1] has reviewed the rulings of the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner insofar as they are consistent with this Decision and Order.

The Trial Examiner found that the discharge of the 10 tin shop employees was in violation of Section 8 (a) (3) and 8 (a) (1) of the Act. The Trial Examiner concluded that, in part, the motivation of Superintendent Wallace in discharging these employees was his fear that they would strike if the wage demand they had gathered together to present met with no success. We do not believe that the record supports this inference. Rather we believe that in discharging the employees Wallace was motivated entirely by the fact that these employees did not immediately accept his explanation of the reason for not granting the wage increase. Instead of summarily accepting the proffered explanation and immediately disbanding the meeting, the employees began to discuss the matter among themselves. It was this momentary hesitation which, in our view, provoked the discharges. Such concerted action under the circumstances of this case was not insubordination,[2] but was concerted activity for the mutual aid or protection of the employees involved, par-
55 ticipation in which is protected by Section 7 of the Act. A discharge for having engaged in such activity violates Section 8 (a) (1) of the Act. Because such a discharge also amounts to a discrimination in hire and tenure of employment,

[1] Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this proceeding to a three-man panel consisting of the undersigned Board Members.

[2] Like the Trial Examiner, we find that nothing in Wallace's statements could reasonably be construed as an order that the men return to work immediately. However, in finding that the employees were not discharged for insubordination we, unlike the Trial Examiner, do not rely on any finding that employee Cutrer was absent at the time of the discharge. Assuming that the record supports a finding that he was absent, this fact becomes significant only if it were to further appear that Wallace knew that Cutrer was absent. The record will not support a finding that Wallace had such knowledge.

thereby discouraging membership in a labor organization,[3] it violates Section 8 (a) (3) of the Act. Moreover, whether the discharge be regarded as a violation of Section 8 (a) (1) or of Section 8 (a) (3) we find that it is necessary to order reinstatement and back pay, as recommended by the Trial Examiner, in order to effectuate the policies of the Act.

2. The Trial Examiner accepted some evidence at the hearing as to the loss of earnings of the employees discriminatorily discharged and their efforts to seek employment elsewhere. The record, however, does not enable us to determine whether or to what extent there has been a willful loss of earnings of any of the complainants as of the time of the hearing.[4] We shall not require additional evidence at this time, however, since the parties may be able amicably to adjust the amount of back pay due upon the basis of facts disclosed when compliance with our Order is undertaken.[5]

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ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Gullett Gin Company, Inc., Amite, Louisiana, and its officers, agent, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in any labor organization of its employees, by discharging or refusing to reinstate or in any manner discriminating against them in regard to their hire and tenure of employment, or any term or condition of employment;

(b) In any other manner, interfering with, restraining, or coercing its employees in the exercise of their right to self organization, to form labor organizations, to bargain collectively through representatives of their own choosing and to engage in concerted

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[3] We adopt the Trial Examiner's finding that by gathering together to present a wage demand the employees constituted themselves a "labor organization" within the meaning of the Act. Matter of Ever Ready Label Corp., 54 N. L. R. B. 551; Matter of Duro Test Corporation, 81 N. L. R. B., No. 151.

Chairman Herzog dissents from the holding that this ad hoc grouping of employees comprised a "labor organization" within the meaning of Section 2 (5) of the Act, and would therefore find no violation of Section 8 (a) (3). He agrees, however, that Section 8 (a) (1) was violated and joins in the remedial Order.

[4] Respondent argued in its supplemental exceptions that any sums of money paid to the complainants from the Louisiana Unemployment Compensation Fund should be deducted from any back pay award the Board would grant. We have previously held that any money received by a discriminatorily discharged employee from a State unemployment fund shall not be regarded as earnings when compensatory back pay is awarded. Matter of Rockwell Stove Works, 63 N. L. R. B. 1297.

[5] This is without prejudice to the Respondent's right, in the event that this matter is not adjusted, to apply for leave to adduce additional evidence as to whether the complainants have willfully incurred a loss of earnings subsequent to the Respondent's discrimination against them. Matter of C. D. Beck and Company, 63 N. L. R. B. 1426; Matter of Detroit Gasket and Manufacturing Company, 78 N. L. R. B. 670.

activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in an labor organization, as authorized in Section 8 (a) (3) of the amended Act, as guaranteed by Section 7 thereof.

57 2. Take the following affirmative action which the Board finds will effectuate the policies of the Act.

(a) Offer to Ellis W. Pechon, Van Buren Bennett, Corydon L. Pechon, J. W. Bankston, Leander Hayden, Elmer Hayden, Jesse J. Hayden, Carl E. Warren, Irving Branch, and Jesse Cutrer immediate and full reinstatement to their former or substantially equivalent positions [6] without prejudice to their seniority or other rights and privileges, and make each of them whole for any loss of pay he may have suffered by reason of the Respondent's discrimination against him by payment to him a sum of money equal to that which he normally would have earned as wages from May 13, 1948, to date of the Respondent's discrimination against him, to the date of the offer of reinstatement, less his net earnings [7] and less willful losses, if any, incurred by him during such period;

(b) Post at its plant in Amite, Louisiana, copies of the notice attached hereto and marked Appendix A.[8] Copies of said notice to be furnished by the Regional Director for the Fifteenth Region after being duly signed by representatives of the Respond-

58 ent shall be posted by Respondent immediately upon receipt thereof and maintained by it for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees customarily are posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by other material; and

(c) Notify the Regional Director for the Fifteenth Region (New Orleans, Louisiana), in writing within ten (10) days from the receipt of this order what steps Respondent has taken to comply herewith.

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[6] In accordance with the Board's consistent interpretation of the term, the expression "former or substantially equivalent position" is intended to mean "former position wherever possible, but if such position is no longer in existence, then to a substantially equivalent position." See Matter of The Chase National Bank of The City of New York, San Juan, Puerto Rico Branch, 65 N. L. R. B. 827.

[7] By "net earnings" is meant earnings less expenses, such as for transportation, room, and board, incurred by an employee in connection with obtaining work and working elsewhere, which would not have been incurred but for his unlawful discrimination and the consequent necessity of his seeking employment elsewhere. Matter of Crossett Lumber Company, 8 N. L. R. B. 440. Monies received for work performed upon Federal, State, county, municipal, or other work-relief projects shall be considered as earnings. Republic Steel Corporation v. N. L. R. B., 311 U. S. 7.

[8] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted before the words: "A DECISION AND ORDER" the words: "DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING."

Signed at Washington, D. C., this 21st day of April 1949.

PAUL H. HERZOG,
Chairman,
JOHN M. HOUSTON,
Member,
ABE MURDOCK,
Member,
[SEAL] *National Labor Relations Board.*

APPENDIX A

NOTICE TO ALL EMPLOYEES

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We will not discourage membership in any labor organization of our employees, by discharging or refusing to reinstate or in any other manner discriminating against them in regard to their tenure of employment or any term or condition of employment.

59 We will not in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection or to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the amended Act, as guaranteed by Section 7 thereof.

We will offer to the employees named below immediate and full reinstatement to their former or substantially equivalent positions without prejudice to any seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay suffered as a result of the discrimination: Ellis W. Pechon, Van Buren Bennett, Corydon L. Pechon, J. W. Bankston, Leander Hayden, Elmer Hayden, Jesse J. Hayden, Carl E. Warren, Irving Branch, Jesse Cutrer.

GULLETT GIN COMPANY, INC.,
Employer.

By _____
(Representative) (Title)

Dated _____.

60 This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Before the National Labor Relations Board, Division of Trial Examiners

Washington, D. C.

Case No. 15–CA–53

IN THE MATTER OF GULLETT GIN COMPANY, INC. AND ELLIS W. PECHON

Messrs. C. Paul Barker and Jerold B. Sindler, for the General Counsel.

Messrs. Lawrence A. Molony and Conrad Myer, of New Orleans, La., for the Respondent.

Miss Mary Purser, of Amite, La for Ellis W. Pechon.

Intermediate report and recommended order

STATEMENT OF THE CASE

On July 2, 1948, Ellis W. Pecon filed an amended charge dated July 1, 1948, with the Regional Director for the Fifteenth
61 Region of the National Labor Relations Board.[1] Thereafter, the General Counsel[2] of the Board issued a complaint dated September 10, 1948, alleging, in substance, that the Respondent, Gullett Gin Company, Inc., had engaged, and was engaging, in unfair labor practices affecting commerce within the meaning of Section 8 (a) (1) and 8 (a) (3) of the National Labor Relations Act (49 Stat. 449–457), as amended (61 Stat. 136–163), herein referred to as the Amended Act.

With respect to the alleged illegal conduct, the complaint avers, in essence, that on May 13, 1948, the Respondent discriminatorily discharged certain named employees "because they (had) engaged in concerted activities for the purpose of collective bargaining and other mutual aid and protection," and that such discharge constituted interference with, restraint, and coercion of, the employees in the exercise of the rights guaranteed to them by Section 7 of the Amended Act. The discharged employees named in the complaint are Ellis W. Pechon, Van Buren Bennett, Corydon L. Pechon, J. W. Bankston, Jesse J. Hayden, Leander Hayden, Carl E. Warren, Jesse Cutrer, and Irving Branch. On September 28, 1948, the General Counsel filed an amendment to the complaint adding the name of another employee, Elmer Hayden, to the above list. Copies of the amended charge, the complaint, and the amendment to the complaint were duly served upon the Respondent and the Charging Party.

The Respondent filed an answer on October 28, 1948, admitting that the employees named in the complaint were no longer in its employ, but specifically denying the charges of unfair labor practice contained therein.

62 Pursuant to notice duly served upon the Respondent and the Charging Party, a hearing was held at Amite, Louisiana, on October 29, 1948, before the undersigned, Herman Marx, duly designated as Trial Examiner by the Chief Trial Examiner.

The General Counsel moved at the inception of the hearing to strike the answer and for "summary judgment" on the ground that the answer had not been served within the time limited

[1] The National Labor Relations Board will be referred to as the Board in this report.
[2] As used in this report the designation General Counsel includes the attorneys who appeared on his behalf at the hearing.

by Section 203.20 of the Board's Rules and Regulations[3] The motion was denied.

At the hearing, the Respondent moved that all witnesses, with the exception of the Charging Party and the Respondent's plant superintendent, be separated. The General Counsel did not oppose the motion, but contended that the superintendent should also be separated because he was not a corporate officer. Upon representation that the superintendent was a member of the Respondent's Board of Directors, had been designated by the Respondent to represent it at the hearing, and was essential to its defense, the undersigned granted the motion in its entirety, allowing the superintendent to remain.

The Respondent moved for leave to file an amendment to its answer. The motion was granted. In substance, the amendment alleges that on May 10, 1948, the discharged employees, through a spokesman, requested a wage increase from the Respondent; that its superintendent informed the spokesman that "it was not possible to grant a wage increase since two unions were at the time petitioning for an election, each claiming to
63 represent all employees in the plant"; that on May 13, the superintendent was requested to meet, and did meet, with the employees in question in the plant and was informed that "they were not satisfied with his previous statement * * * and (that) they wanted a wage increase"; that he reiterated the Respondent's position, asserting that to grant the increase "would be a violation of the law," and directed the men "to return to their jobs or to leave the plant"; and that "as the men continued to sit around and do nothing and indicated an unwillingness to return to their jobs, he then informed them they were discharged and would proceed to replace them." The amendment concludes with an averment that the men were discharged for "insubordination in refusing to work and for an illegal strike for an illegal objective."

Under cross-examination during the hearing, several of the employees named in the complaint were questioned in substance and effect whether they had sought employment or had been employed, since their discharge. The General Counsel objected to this line of questioning. The Trial Examiner overruled the objection. Prior to the close of the hearing, the General Counsel moved to strike the testimony adduced over his objection, and the undersigned reserved decision on the motion. The Trial Examiner has reached the conclusion that it was not improper to

[3] The complaint was served on September 17, 1948, and the amendment to the complaint on September 29, 1948. The answer was filed on October 28, 1948, the day before the hearing.

admit the evidence in question and that the motion should be denied.[4]

64 All parties were represented by counsel at the hearing, participated therein, and were afforded a full opportunity to be heard, examine and cross-examine witnesses, adduce evidence bearing on the issue, submit oral argument and filed briefs. The General Counsel and the Respondent submitted oral argument at the close of the case and have filed briefs which the undersigned has read and considered.

Upon the entire record and from his observations of the witnesses, the Trial Examiner makes the following:

Findings of Fact

I. THE BUSINESS OF THE RESPONDENT

Gullett Gin Company, Inc., is a Louisiana corporation engaged in the manufacture of cotton gins at its manufacturing establishment in Amite, Louisiana. During the course of the year 1948, the Company received from points in other States raw materials valued at a sum in excess of $100,000 and manufactured and distributed to customers in other States finished products valued at more than $10,000.[5]

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The background of the discharge

The Respondent employs approximately 200 production and maintenance employees at its plant in Amite, Louisiana.

65 Among the departments in the factory is a tin shop which, at the time of the alleged discharges in May 1948, employed 10 sheet metal workers, in addition to a foreman.

Upon petition of the United Steelworkers of America, CIO, and after a hearing thereon, the Board, on March 12, 1947, decided that all production and maintenance employees (with certain exceptions not relevant here), including those employed in the tin shop, constituted an appropriate collective bargaining unit,

[4] The admission of such evidence is not improper. Cf. Subin v. N. L. R. B., 112 F. 2d 326 (C. A. 3). N. L. R. B. v. Condenser Corp., 10 L. L. R. M. 483 (C. A. 3). However, to the extent that it may have a bearing on any claim that the extent of a back pay award should be mitigated, it would be more appropriate to resolve that question either by administrative adjustment or such other procedure as the Board may properly provide, after the Trial Examiner submits his report, particularly as it is unknown until after such submission whether he will recommend reinstatement. As to the power of the Board, after the Examiner submits his report, to make an appropriate order or receive evidence bearing on the question of mitigation see Phelps Dodge Corp. v. N. L. R. B., 313 U. S. 177.

[5] The findings with respect to the nature of the Respondent's business and the extent of its interstate operations are based on the admission in the Respondent's answer of the allegations contained in Paragraph II and III of the complaint.

and directed an election to determine the question of representation.[6] Pursuant to the terms of the Board's decision, an election was held on March 20, 1947, under the supervision of the Regional Director for the Fifteenth Region, with the result that a majority of the employees signified their wish to be represented by the petitioning union,[7] which was thereupon certified by the Board as the employees' collective bargaining representative. Subsequent to the election, the Union and the Respondent entered into a collective bargaining agreement covering the employees in the unit, including those named in the complaint. That contract expired on May 9, 1948.

During the period of the concerted activities alleged in the complaint (May 10 to May 13, 1948, inclusive), none of the employees named therein were members of the United Steelworkers. With the exception of Ellis W. Pechon (who, during the period in question, was a member of United Cotton Gin Workers Association of Amite, Louisiana) the employees involved were members of the Industrial Union of Marine and Shipbuild-
66 ing Workers of America, CIO, and had at some unspecified time prior to May 10, 1948, transferred their membership to that organization from the United Steelworkers.[8]

On March 8, 1948, the United Steelworkers wrote the Respondent, in substance, that it wished a meeting for the purpose of modifying the agreement then in effect. On April 6, 1948, the Respondent, through its counsel, wrote, in substance, to the United Steelworkers that it had received a "demand" from the United Cotton Gin Workers Association of Amite, Louisiana, "claiming to represent a majority of the employees," that the Company had advised that organization that the United Steelworkers claimed "to represent the employees," that it would not meet with the United Cotton Gin Workers until it "had proof of representation,"

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[6] See Joint Ex. "A" introduced in evidence at the hearing by all parties as the Decision and Direction of Election in Matter of Gullett Gin Company, Case No. 15-R-1949.

[7] United Steelworkers of America, CIO, was the only labor organization listed on the ballot. The question on the ballot was whether the employees wished "to be represented by the United Steel Workers of America, CIO."

[8] This finding with respect to the transfer is based on Leander Hayden's uncontradicted testimony that the employees who had held membership in the United Steelworkers had transferred such membership to the Marine and Shipbuilding Workers. Respondent's counsel adduced this testimony on cross-examination of Hayden, intimating that the transfer occurred because the United Steelworkers "had not qualified before the Board" (by complying with the filing requirements of Section 9). From the context of the questions put to Hayden and his answers (although not entirely responsive) it is inferable that Hayden intended his answer to mean that the transfer occurred because the United Steelworkers were not "qualified" to use the facilities of the Board. In any event, Respondents counsel stated in the open hearing, in support of his offer of some correspondence between the Respondent and the United Steelworkers, that that union as of May 10, 1948, had not "qualified" (meaning by intendment that it had not complied with all filing requirements of Section 9, that the membership of the men in that union had previously been transferred to the Marine and Shipbuilding Workers, and that the United Steelworkers could not "get the services of the Board" or, in other words, that it could not, at the time of the events in question apply again for certification.

and that the Company would "require proof of representation from the union representing the majority of employees before we commence negotiation of a new contract."[9]

67 On May 5, 1948, a few days prior to the expiration of the existing contract with the Steelworkers, United Cotton Gin Workers Association of Amite, Louisiana, filed a petition for certification with the Regional Director, claiming to represent the employees in the unit. On May 6, 1948, a similar petition was filed with the Regional Director by Industrial Union of Marine and Shipbuilding Workers of America, CIO. An agreement for a consent election was entered into on May 18, 1948, between the Respondent and the two petitioning unions, and an election was held on May 28, 1948. The United Steelworkers did not intervene or otherwise participate in these representation proceedings. The election resulted in the choice by the employees of the Industrial Union of Marine and Shipbuilding Workers of America, CIO, as their representative. That union was so certified on June 7, 1948, and entered into a collective bargaining agreement with the Respondent on August 2, 1948.[10]

B. The testimony relating to the discharge

On Monday, May 10, 1948, the day after the expiration of the Steelworkers' contract, the tin shop employees, 10 in number, agreed among themselves to ask the Respondent for a wage increase. They designated their leaderman, Elmer Hayden, as a spokesman to place their request before J. J. Wallace, the plant superintendent. Later that morning, Hayden spoke to Wallace about the matter in the tin shop. In substance, Wallace told him that because of the pending petitions for certification and the impending election, the Respondent could not grant an in-

68 crease for fear that it would be accused of an unfair labor practice.[11] Wallace testified that "they talked on about a

[9] There is no evidence that the Steelworkers at any time after the Respondent's letter of April 6, 1948, ever attempted to negotiate either a modification of its existing contract or its renewal.

[10] At the hearing the parties stipulated the facts with respect to both the 1947 and 1948 elections, the certifications described above, and the agreements which followed the respective elections, and the Trial Examiner finds the facts embodied in the stipulation to be true.

[11] Hayden's account of the conversation differs somewhat from that given by Wallace, but the Trial Examiner regards the variance as insubstantial. According to Hayden, Wallace's response was that "he wouldn't give any raise, he might be violating the labor law and he wouldn't do anything about it." Wallace testified that he told Hayden: "Well, I am in a position where I can't give you a raise nor either do I want to discuss rate increases with you now. We have a petition by two different unions who are now claiming that they represent the men—a majority of the men, and until that is decided, I am not going to give any rate increases to anyone because if I do, I may be accused of attempting to sway the election one way or the other. Or even I may be accused of unfair labor practices. I am not going to be able to do that and you are going to have to tell the boys that we can't do that and they will have to wait until the election and determine who will be the bargaining agent to represent the men. At that time we will be able to straighten out this unequal pay you are talking about."

good many other things, how much work they had been doing, how much wheat he (Hayden) had been growing, and I expect we spent about 30 minutes. Some of the talk was irrelevant and some of it was not."

Hayden reported the results of his meeting with Wallace to the men at noon. During the next 2 days, principally during the noon lunch periods, there was some discussion among them, although no formal meetings were held. They were dissatisfied with the results of Hayden's approach to Wallace, and it is also evident that they were not wholly satisfied with the effectiveness of their spokesman.[12] As one of them, Irving Branch, summed it up in his testimony: "* * * we don't know what he (Wallace) said. We don't know what he told Elmer."

During the lunch period on Wednesday, May 12, there
69 was some talk among them about having Wallace "come in the shop,"[13] and on the following morning, before the commencement of the day's work, some of them, at least, decided to "get Mr. Wallace back down here and hear what he's got to say."[14] Sometime before 9 o'clock on Thursday morning, the men delegated Leander Hayden, one of the employees and Elmer's uncle, to request Peter J. Dieterich, foreman of the tin shop, to inform Superintendent Wallace to come to the shop, because "the men wanted to talk to him as a group."[15] Dieterich went to see Wallace and returned with him to the shop shortly after 9 o'clock.[16]

Testimony concerning the events of the meeting was given at the hearing by Ellis Pechon, Elmer and Leander Hayden, Irving Branch, and Van Buren Bennett, who were called by the General Counsel,[17] and by Foreman Dieterich and Superintendent Wallace, who were called by the Respondent. All of the tin shop employees, including Foreman Dieterich, attended the meeting with the superintendent. One of the men, Jesse Cutrer, was not pres-

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[12] Elmer Hayden testified that after he reported back to the men he "* * * couldn't make satisfaction with them." Another witness, Ellis Pechon, quoted Hayden as saying that he "couldn't explain to the men * * * was afraid he wasn't a very good talker." On the witness stand Elmer Hayden manifested considerable difficulty in articulation. There were long pauses between questions put to him by counsel and his answers, and between some of his sentences. There was obvious strain in his efforts to find words to express his ideas.

[13] See testimony of Van Buren Bennett.

[14] See testimony of Irving Branch.

[15] See testimony of Dieterich, Pechon, and Leander Hayden.

[16] The facts set out above, from the initial designation of Elmer Hayden as the employees' spokesman to the appearance of Wallace in the shop to meet with the men, are based upon a synthesis of uncontradicted applicable portions of testimony given by Pechon, the two Haydens, Branch, Bennett, Dieterich, and Wallace.

[17] At the close of his case and before he rested, the General Counsel announced that the other tin shop employees, Corydon Pechon, Jesse Hayden, Jesse Cutrer, Carl Warren, and J. W. Bankston were present at the hearing and available for testimony, but that unless the Trial Examiner desired, he would not call them as witnesses as their testimony would be cumulative. Respondent's counsel stated that he had no personal knowledge of their presence, but that if the General Counsel said they were present and ready to testify, "it is a fact." The General Counsel and Respondent's counsel also stipulated that these employees, as well as those who testified, were discharged at the same time.

ent during part of the meeting. Cutrer was present at is beginning, but left for the lavatory at some unspecified point
70 during its course, and did not return until after the close of the meeting and the discharge in question had occurred.[18]

The testimony of the discharged employees, with respect to the main features of the meeting may be summarized as follows: The discussion lasted approximately 15 minutes.[19] Elmer Hayden placed the question of requested increase before Wallace and asked the superintendent to explain to the men what he had previously told him.[20] Wallace responded, in substance, that the Company could not grant the increase because an election by the Board would soon be held to determine which of two unions would represent the men, that an increase at that time might be construed as an attempt to influence the men's votes in the election and, therefore, might constitute a violation of the law, and that the Company would be willing to bargain about the
71 matter after the election.[21] Then there ensued a discussion between Wallace and individual members of the group, relating mainly to the claim of the employees that their wages should be raised to a level with those paid to a group of machinists employed in another department. Finally, Wallace put it to the men in purport and effect whether they were going to go to work or "what they were going to do," and before they had any time to respond, he said in substance or effect that he was

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[18] The finding with respect to Cutrer's absence is based upon the uncontradicted statement to that effect by Ellis Pechon in his testimony. Respondent's counsel did not touch upon the matter in his cross-examination of Pechon.

[19] Pechon and Leander Hayden estimated the duration of the meeting as 15 minutes; Branch and Elmer Hayden as "15 or 20 minutes," and Bennett as "five or six or ten minutes, something like that."

[20] Pechon and Elmer Hayden testified that Elmer requested both the increase and the explanation. Elmer testified: "Well, I told him (Wallace) we wanted more money and if he couldn't give more money to tell the boys because I couldn't make satisfaction with them." Branch's recital of Elmer's opening statement does not mention wages, quoting him as saying: "Mr. Wallace, the boys want to hear what you got to say." Bennett quotes Elmer as saying: "Mr. Wallace we have come to see you about our wages." Wallace's account is that Elmer said "Mr. Wallace, the men don't seem to believe what I told them and they want you to talk to them. They feel that they should have the same rate that the top machinists get." From a synthesis of the testimony, the Trial Examiner finds that the import of Elmer's statement was to place the men's request for an increase before Wallace, and, if it could not be granted, to explain the reason for the refusal because he had not been able to do so satisfactorily.

[21] The Trial Examiner finds that this was the substance of Wallace's response which is set forth in substantial detail in the testimony of all of the witnesses called by both the General Counsel and the Respondent, with the exception of Bennett and Leander Hayden. While their testimony adequately reflects much of the summary of the superintendent's response given above, they do not describe it in as great detail as the other witnesses. Bennett testified: "Mr. Wallace said: 'Boys, I can't do any more. I can't do any more on account of the Labor Board has got me—I just can't do any more.'" At another point in his testimony Bennett quoted Wallace as saying, "I'd get myself in a jam and I just can't do any more." Leander quoted Wallace on this point as saying "he couldn't give a raise" and, under cross-examination, stated that Wallace "said he couldn't give any raise until after the election" and that "he had to wait until that was done." The Trial Examiner does not accord any significance to the variances between the description of Wallace's explanation contained in Bennett's and Leander Hayden's testimony and that given by Pechon, Elmer Hayden and Branch. The differences are those of emphasis, personal articulation and individualized use of colloquial expressions. The meaning of the testimony is plain when considered within the context of the case as a whole.

not paying them to "set" or "stand around,"[22] and discharged the entire group, except Dieterich.

The employees either expressly or by clear implication deny that they refused to return to work or that Wallace gave them an opportunity to do so. Pechon stated that the discharge came (after Wallace's inquiry as to what the men were going to do) "before anybody could open their mouth," that Wallace's concluding remarks were "almost one sentence," and that "he (Wallace) gave the question and answer." Elmer Hayden testified that "they didn't have time" to indicate a willingness to return to work. Branch asserted that he "couldn't say" how long
72 a time lapse occurred after Wallace's inquiry, but that "it wasn't very long," that he would have had time, "if I would have had it right on my lips," and that "I thought he would want to separate those that wanted to work and those that did not, but it didn't go that far." Bennett testified that nobody started back to work because they "didn't have time." Leander Hayden stated that nobody answered Wallace's inquiry because "they didn't have time to answer." Immediately after the discharge, Wallace left the shop, and the men collected their tools, punched the time clock, and left the plant.

In describing the meeting, Wallace and Dieterich substantially agree with much of the testimony of the discharged employees. They agree that Wallace was requested to explain his reasons for refusing to grant the increase and that there was some discussion of the wages paid employees in another department as compared with those paid the tin shop group. There is also no substantial difference between the versions given by Wallace and Dieterich of the superintendent's explanation and those given by the employees. Finally, the Respondent's witnesses agree that Wallace concluded the meeting by discharging the entire tin shop staff, except Dieterich.

The only significant divergence in the accounts given by Wallace and Dieterich from those given by the men is testimony by both Wallace and Dieterich that at some point during the meeting one or two of the men made a move to return to work, but that Leander Hayden dissuaded them with a certain remark; that the superintendent on two occasions—once during the middle of the meeting and the other toward its close—requested the men to return to work; that in each instance, he gave them, and waited, an estimated 5 minutes to do so; and that when they did

[22] Branch and Bennett made no reference in their testimony to any statement by Wallace in words or substance that he was not paying the men to "sit" or "stand around." Pechon and Elmer and Leander Hayden attribute a remark of that tenor to Wallace, and both Wallace and Dieterich assert that the superintendent made a statement to that effect in his concluding remarks discharging the men. The Trial Examiner finds that such a statement was made.

not accede to his request at the end of the second period, he concluded the meeting by discharging them.

The following is a narrative account of the meeting taken from Wallace's testimony:

He (Leander Hayden) reiterated approximated (sic) the same thing that Elmer did and I told him the same thing. I said, "Boys we can't do a thing about it. I am not going to stick my neck out by changing your rate now. I am going to do this thing like I think it ought to be done and that won't be a change of rate. What I would like for you men to do is to go back to work and see if you can't get satisfied like you were until this election is over and then we will try to determine and settle some of these things that you now complain of." Well, they hesitated and didn't say anything. I didn't say anything more about (the) thing. In this time which I would say was somewhat in the neighborhood of 30 minutes there were a lot of words said that did not apply particularly to this rate question. It was talk in general, but that was the definite statement that I made.

* * * * *

The general talk was that I think that I am as good as this fellow and I believe I ought to have (the) rate and this one is as good as somebody else and that was the general talk that I could hear. To my back there was two men I wouldn't be able to name them but one of them I think was Buren Bennett the other one I don't know.

* * * * *

They didn't say anything about that so it didn't look like we were getting anywhere so I reiterated the same thing. I said, "Boys, I can't do anything for you in this case now." Then I still talked some more about the reason why. That I was not going to be able to do it and I didn't want to influence—I didn't want to be in a position of being accused of trying to bribe the boys in their voting one way or the other. I wasn't going to do it and I told them so. These two men said, "that sounds fair enough."

Trial Examiner MARX. Indicating which two?

The WITNESS. Buren Bennett I am almost certain and I don't know who the other one was, he was behind me. When I turned around—before I turned around Mr. Leander Hayden said "Are you boys going to quit now?" With that these two men who were behind me walked over on this side [indicating to the left]. No; we are going to stick together. I was still at this end of the tables [indicating to the right] so I said, "boys I would like for you to stay on, but there is one of two things you can do. You

can quit and if you quit you are going to lose your seniority and you won't be able to vote in this election. The other one is you can take this job and go on with it and wait until the outcome of the election. Now what are you going to do?"

They waited a while and they didn't (sic) what to do. There was not a murmur out of anyone.

I said, "well boys I am not sure that we can have you sitting around on tables and not having you do anything.
75 I am afraid I will have to make up your minds for you. I am going to fire you and all of you consider yourself fired as of this date."

At subsequent points in his evidence, both under direct and cross-examination, Wallace testified that he "gave" the men approximately 5 minutes to return to work after each of his claimed requests and that after the second 5-minute period he discharged them.[23] He testified as follows in his direct examination:[24]

* * * I gave them ample time which I would consider was about five minutes to make up (their) minds. Nobody said anything during that five minute period.[25]

I started talking again because I didn't get any answer and I reiterated that statement and requested them to go back to work.

Then I gave them another five minutes and then I told them that "if you can't work I can't have you on my payroll and I am going to have to let you go, you are going to be fired."

Toward the end of his testimony in response to some ques-
76 tions put to him by the Trial Examiner, Wallace gave a different version of the time factors involved. In effect, he divided his discussion with the men into two parts (as he had also done during his preceding testimony); the first consisting of a discussion followed by a waiting period for the men to return to work, and the second of a renewal of the discussion, followed by another waiting period, and ending in the discharge of the men. He testified that "it took up ten minutes before we got around to that end of the talk" (his first request that they return to work), with some interchange between him and the men, and he affirmed that he consumed the major part of that period with his talk and

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[23] In Wallace's cross-examination, the General Counsel, without objection, conducted a time test to determine Wallace's conception of 5 minutes. According to the Trial Examiner's watch, Wallace estimated a 3 minute period as taking 5 minutes. Respondent's counsel stated that "approximately three minutes" had elapsed.

[24] Although in his cross-examination, Wallace did not state, in precise terms, that he gave the employees 5 minutes after the second request to decide their course, there are points in his evidence in which that was the definite implication and import. For example:

Q. You were not upset during the first 5 minute period?
A. No or the second one either.

[25] Under cross-examination, Wallace testified that after his first request that the men return to work "they did some discussion among themselves, but what they were discussing about then, I don't know," and in response to a question whether he "gave them five minutes" then, he replied, "I think every bit of it."

that the employees were "primarily" listening to him. Then Wallace testified that "we stopped about five minutes and talked about ten minutes about the same set up," in which period, he affirmed, there was not much interrogation by the men, which consisted of "why I couldn't do it or why I shouldn't do it." At this point in his testimony, in describing the time lapse between his asserted second request and the discharge, although he had previously estimated it as "another five minutes," Wallace measured the "hesitation" of the men as follows:

* * * They hesitated a little while and I said "now gentlemen, I am going to make up your minds for you. I am going to let you go."

Q. How long would you say they hesitated?

A. I don't know—long enough to say yes or no.

Q. Will you try to give me the best recollection you have, as well as you can remember?

A. A minute—maybe two.

77 Wallace asserted in his testimony that during the first period of hesitation, the men did not say anything to him and that during the second, "there was not a murmur out of anyone."[26]

With respect to the asserted waiting periods, Dieterich testified: "I think he (Wallace) gave them about five minutes each time and the second time after they made no move to go back to work, then he told them he would have to let them go." And, at a later point in his testimony, Dieterich stated that he thought "about five minutes" elapsed between the second request and the discharge. With respect to the question of what the men were doing during the claimed 5-minute waiting periods, Dieterich testified that during the first "a little mumbling" went on among them, but that he could not make out what they were saying, and that during the second period, he did not think that the men talked among themselves, although he did not "remember exactly." According to Dieterich, however, there "might have been one or two" who said they would return to work, but that they did not "make any move" to do so, because Leander Hayden said, "You all are not going to back down now, are you?"[27]

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[26] At other points in his testimony, Wallace indicated that there was some discussion among the men during one or both periods of hesitation (see footnote 27, post).

[27] It is difficult to determine from Dieterich's testimony the point in the meeting at which he attributes this remark to Leander. He implies that it was made during one of the 5-minute periods of hesitation, but it is not clear in which one. It is also not clear whether it came during a period when Dieterich claims the men were "mumbling" among themselves. Inferentially, the incident appears to be the one referred to by Wallace. There is also some confusion in Wallace's testimony as to the point at which he claims it occurred. At one point in his testimony, he indicated that the incident occurred after the first request that the men return to work, and at another after the second request.

C. Evaluation of the testimony and concluding findings

Upon the basis of the entire record and his observation of the demeanor and characteristics of the witnesses, the
78 Trial Examiner has reached the conclusion that the employees were not afforded an adequate opportunity to return to work, that they did not refuse to do so, that they were not insubordinate, and that the real reason for their discharge was their concerted activity to secure a wage increase and Wallace's belief that the men would strike after his rejection of their request.

It is usally of little or no consequence that a witness estimates a given event to have lasted a particular number of minutes rather than another. The fallibility of human recollection and perception is such that it is expected that a witness can usually give only a rough approximation of the time according to his best recollection unless he actually measures it when the event under his observation occurs. In the instant case, however, time factors have an important bearing on the claim of insubordination. If the accounts of Wallace and Dieterich with respect to the claimed waiting periods are to be credited, they were, at least in part, a standard by which Wallace measured his asserted conclusion that the men were insubordinate. The periods themselves became a timing instrument, and it is reasonable to expect that, if they occurred, they would become fixed in the recollection of the participants in the meeting. Thus, the undersigned regards the estimate by all the witnesses of the time lapse between Wallace's inquiry as to the men's intentions and his words of discharge as of more than ordinary importance.

As the evidence developed at the hearing, it became manifest that the question whether Wallace afforded the men a reasonable opportunity to return to work would assume some importance. On this point, the testimony of the discharged employees, who were, with the exception of Pechon, excluded from the
79 hearing room before testifying, was substantially consistent, despite some variances in their respective accounts. The reaction of the undersigned, while listening to them, was that their versions were not the product of concerted formulation, but that each individual was giving his best recollection.[28] While

[28] Variances in the testimony of the employees relate in the main to the paraphrasing and interpretation of the remarks attributed to Wallace and to the movement and comments among a group of 10 men spread out around a table from 15 to 20 feet in length in a meeting of substantial, if not critical, economic importance to them. The differences in their recollection of what Wallace said and the reaction of the men to his remarks derive from the variables of articulation among people and the infirmities of the memory with respect to details of events such as those in question which involved 12 people (including Wallace and Dieterich) and extended over a period of time. The important criteria are whether discrepancies or faulty recollection are of such a nature as to make the witnesses unworthy of belief. From his observation of the employees who testified, the Trial Examiner has concluded that discrepancies in their testimony did not proceed from a purpose to evade or disregard the truth. Whatever faulty recollection they had related to details and not significant facts.

they did not state it in terms, the consistent thread that ran through their accounts was one of surprise at the time of the meeting that it had taken a sudden turn culminating in their discharge.

On the other hand, there are significant disparities in the accounts of Wallace and Dieterich with respect to the claimed waiting periods, which taken with their demeanor while testifying and the entire context of events, lead to the conclusion that their claim that the men were insubordinate, including their testimony with respect to the waiting periods, should not be credited.

There was firm assertion by both Wallace, who was not excluded from the hearing room and heard the employees testify, and Dieterich, on their direct and cross-examination, that Wallace twice waited for a period of about 5 minutes after two purported requests that the men return to work. However, at
80 the very end of his testimony, at a moment which the undersigned observed to be unguarded, a basic disparity appeared in Wallace's testimony concerning the second 5-minute waiting period. After relating against the substance of his second request, he testified that the men "hesitated a little while" before he discharged them. Asked how long they "hesitated," Wallace responded, "I don't know—long enough to say yes or no." Then in answer to a request that he give his best recollection of the time lapse, he replied, "A minute—maybe two."[29]

Wholly aside from the fact that "hesitation," the term applied twice by Wallace[30] to characterize the attitude of the men during the two claimed waiting periods, does not quite accord with the Respondent's claim of refusal and insubordination, there is a manifest incompatability between the last-quoted testimony and the second 5-minute waiting period which Wallace consistently asserted in the rest of his testimony, as did Dieterich in his.

Another substantial inconsistency relating to the second 5-minute waiting period emerged during Dieterich's testimony. Like Wallace, Dieterich testified that the entire meeting lasted "a half hour or something like that and it must have been five or ten minutes between each time he asked them" (to return to work). He described the conversation preceding the claimed first request much as Wallace did in his testimony. The import of his testimony is that in the "five or ten minutes between" the first and second request Wallace again explained the Company's position.[31]

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[29] It is interesting to note that a full "minute—maybe two" are far longer than the time required "to say yes or no."

[30] See Wallace's narrative account, under direct examination, of his first request that the men return to work.

[31] Dieterich's testimony concerning the substance of Wallace's conversation between the two requests is very scant. About all he said concerning it was: "He explained to them he couldn't raise the wages and wasn't going to."

81 The General Counsel introduced an affidavit dated June 25, 1948 (about 6 weeks after the discharge), which Dieterich had given to a Field Examiner employed in the office of the Fifteenth Region of the Board. The witness testified that the Field Examiner "told me to tell him, in my own words, what happened" and that "I did." Dieterich also affirmed that the affidavit contained to the best of his recollection "at that time" (when he made the affidavit) what he "recalled of the occurrence." [32]

In the sworn statement Dieterich set forth substantially the same version, as in his testimony, of the conversation between Wallace and the men preceding the first request that they return to work. After reciting that part of the conversation, the affidavit states:

Then Mr. Wallace asked if they were willing to go back to work under those circumstances. He waited a few minutes and nobody made a move to go back to work. No one talked out although there was some mumbling amongst themselves. Mr. Wallace waited a few minutes and asked them the same thing again. No one moved or said anything so Mr. Wallace (said), "I have you on my payroll, and can't pay you for sitting on the benches. So I just fire the whole bunch of you at one time."

It is to be observed that Wallace testified that there were two distinct periods of an estimated 10 minutes' duration,[33] both
82 before and after the first request, in each of which he explained the Respondent's position and exchanged some remarks with the men. The general import of Dieterich's testimony is to the same effect,[34] and that after the second request, Wallace waited about 5 minutes before firing the men. Yet, the statement which was given a relatively short time after the discharge makes no mention of a second 5-minute waiting period, although it specifically states that Wallace "waited a few min-

[32] Dieterich affirmed that when the Field Examiner took his affidavit, he was not asked "questions specifically about this, that, and the other thing."

[33] See the concluding portion of Wallace's testimony in response to some questions from the Trial Examiner. There is also confusion in his estimate of the duration of his explanatory remarks to the men. In his direct testimony, he estimated that "five minutes or so" elapsed between the two requests that the men return to work, which is not consistent with the claim that there was a 5-minute waiting period after the first request followed by a second 10-minute period of explanation before the second request (a total of 15 minutes between both requests). Further confusion is manifest in his direct examination immediately after his statement that "five minutes or so" elapsed between both requests. Respondent's counsel asked him how much time elapsed between the first request and his departure from the shop, and Wallace responded, "I suppose I talked with them about 20 minutes," indicating that 20 minutes elapsed between the first request and his departure. However, in the very next question counsel in effect asked him whether the 20 minutes referred to elapsed "in between the two requests that they return to work," and Wallace answered, "Yes," thus successively indicating first that "five minutes or so" elapsed between the two requests, and then that the period was 20 minutes. While these inconsistencies, standing alone, are not decisive, nor even particularly significant, they tend, in conjunction with other disparities, to diminish the value and reliability of evidence offered by the Respondent of the waiting period as indicia of insubordination.

[34] Dieterich, in his direct testimony, estimated that "five or ten minutes" elapsed between both requests.

utes" after the first request and then repeated it. There is also no mention of a second 10-minute explanation by Wallace and of a colloquy between him and the men, as he testified. Nor is there any reference to the fact that two employees made a move to return to work, but that Leander Hayden dissuaded them.

Dieterich's affidavit tends to refute his own testimony, and that of Wallace, that there were two explanatory statements made by Wallace at the meeting, lasting about 10 minutes each, one before and one after a request that the men return to work, and that there were two 5-minute waiting periods after each request. Significantly, it contains no mention of the circumstances that Leander Hayden dissuaded two employees from returning to work during the meeting, a matter which the Respond-
83 ent appeared to stress in its evidence as demonstrating the insubordinate design of the group. In omitting these circumstances, the affidavit gives substantially less factual support to the claimed insubordination than does the testimony of both Wallace and Dieterich at the hearing.

Another circumstance, tending to cast doubt on Wallace's claim that the employees were insubordinate, appeared toward the close of Wallace' testimony. In his cross-examination, responding to a question by counsel whether any of the men "affirmatively" said "they were not going back to work," he replied, "No; I don't know that they did." Neither Wallace nor Deiterich, either under direct or cross-examination, quoted any of the men as saying, in terms, that they would not return to work unless the increase was granted. The whole import and tenor of their testimony, both on direct and cross-examination, was that their assumption that the employees refused to work was based on the conduct of the men in not returning to work and the claimed colloquy between Leander and two of the men, and not on an explicit statement by any of them that they would not return unless their request was granted.[35] However, toward the end of his
84 testimony, after he had fully described the meeting under direct and cross-examination, Wallace, for the first time,

[35] In his direct testimony Dieterich stated that there "might have been one or two" who said (in response to Wallace's request) that they would return to work." Then in response to counsel's question whether anything was said to them, he asserted that "Leander spoke up and said, 'You all are not going to back down now, are you?'" Questioned as to the response of the "one or two" to Leander's remark, Dieterich replied that "they" said, "No, they refused to go back to work." At this point counsel inquired, "They said they were not going to back down and they refused to go back to work," and Dieterich responded, "They never made any move to go to work." Based upon the uncertainty manifest in the foregoing, the fact that Dieterich in his affidavit imputes no such stated refusal to any of the men, but, in fact implies the contrary, and the fact that Dieterich, under cross-examination and after some prodding, admitted that it "seemed" that the men "agreed not to go back to work," basing his assumption on Leander's statement, the Trial Examiner concludes that Dieterich did not intend to testify on direct examination that he actually heard the "one or two" men refuse explicitly to resume work, and that if he did so intend, then his testimony to that effect is unreliable and not to be credited.

in responding to a question from the Trial Examiner whether there was "anything said by anyone that would indicate" to him that the employees "would not work," testified as follows:

A. Yes; they said if they didn't get the rate we are not going to be able to work.

Q. Did somebody say that?

A. Yes.

Q. Who said that?

A. I think Mr. Hayden said that.

Q. He said that if they didn't bet the rate change they would not work?

A. Yes.

Q. Was that Elmer or Leander Hayden?

A. Elmer.

Q. At what point was that?

A. That was in the second session when we were talking about why we couldn't do it.

Q. With respect to that statement made by Leander, or was it Elmer?

A. It was Leander.

If true, such testimony is important. If untrue, it serves to throw suspicion on other aspects of Wallace's testimony. Aside from Wallace's manifest confusion and uncertainty in first attributing the remark to Elmer and then to Leander, it is strange that Wallace made no reference to it in his direct and cross-examination, although ample opportunity to do so responsively was available, and equally strange that Dieterich made no mention of a remark in those terms in his testimony. Moreover, it is plainly inconsistent with Wallace's statement on cross-examination that none of the men had said "affirmatively" that they would not return to work. Based upon Wallace's demeanor when he gave the testimony quoted above, its inconsistency with his previous testimony, Dieterich's failure to mention, either in his testimony or his affidavit, a refusal couched in those terms by either Elmer or Leander, and the point at which it appears in Wallace's testimony, the Trial Examiner believes that it was an afterthought, and he does not credit Wallace's assertion that such a stated refusal to return to work was made, whether by Elmer or Leander.

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There is considerable reference in the testimony adduced by the Respondent to two purported "requests" that the men return to work, and the Respondent advances the thesis, at least by strong implication, that the employees insubordinately refused to comply with the first as well as the second. It supports its position by testimony that the claimed first request was followed by 5 minutes of silence by Wallace and that he "gave" them that

time to return to work, but that they evidenced refusal by their conduct. The first request merits separate analysis.

According to Wallace, the purported first request was made after his initial explanation and was couched in the following terms:

What I would like for you men to do is to go back to work and see if you can't get satisfied like you were until this election is over and then we will try to determine and settle some of these things you now complain of.

The discharged men made no reference to this statement in their testimony. They testified, in substance, to one definitive inquiry by Wallace, at *the close of the meeting*, whether
86 they would return to work and that their discharge came almost immediately thereafter. However, that does not inevitably involve a conflict between their testimony and that of Wallace quoted above. Wallace's statement is consistent with the employees' assertion that they had no opportunity to return to work in response to any instruction that they do so, provided that the statement was not followed, as Wallace claims, by a measurable waiting period. The purported request assumed significance only if it was followed by some indication that he expected the men to comply with it at that point, and obviously the only asserted circumstance relied upon by the Respondent to give the statement the stature of an instruction is the claimed waiting period. In its absence, it was reasonable for the men to construe Wallace's quoted remarks as part of his general explanation, and not as a direction that they return to work. If the period did not occur, the emphasis in the statement is not in any suggestion that the men resume their work, but in the proposal that the question under consideration be deferred until a later date.

The text of the language employed is not of the type normally used to convey a definitive direction or command. It is completely lacking in any disciplinary connotation[26] which would usually characterize language preceding an interval designed as a meaningful opportunity for employees to carry out an instruction to work. Considered as a sequence of events, the waiting period is not an event that evolves naturally and easily from the language immediately preceding it, and, in that light, the testimony concerning the claimed interval assumes a mechanical complexion.

87 Insubordination implies defiance, and it is reasonable to assume that at least one or more of the employees would have regarded the waiting period, if it occurred, as a challenge

[26] That the words used had no disciplinary meaning is given added emphasis by Wallace's assertion in his cross-examination that the meeting preceding his second request was "a friendly discussion of what was going on."

to their intentions and would have signified a defiant attitude at least in some fashion. However, the Respondent's evidence is to the effect that none of the men made any response to Wallace during the first waiting period (nor, for that matter, during the second as well). Bearing in mind the varied ages and and temperaments of the employees, it is difficult to believe that every one of the employees would permit the interval to pass without making a statement of some sort to Wallace.[87] Moreover, in other connections, Wallace testified under cross-examination, that the meeting was "a friendly discussion," that the employees did not look angry, and that they were respectful in their attitude. Within the whole framework of the evidence, it is difficult to
88 reconcile the picture of the men's conduct, as it emerges from the Respondent's testimony, with the claim that Wallace gave them a 5-minute period to return to work, during which they manifested an insubordinate refusal to do so. Finally, as has been observed above, the estimates of time by both Wallace and Dieterich, in situations where such estimates have significance, have an unreliable quality.

For the reasons indicated, and based upon his observation of the demeanor of Wallace and Dieterich when they testified to the purported first request and the waiting interval succeeding it, the undersigned regards the portions of their testimony bearing on that period as unreliable and not to be credited. Considered in that light, the Examiner finds that Wallace's statement quoted above has no particular significance as a request that the men return to work; that the import of the language used was that Wallace wished the question of the wage increase to be deferred until after the election; and that the men had a right within the general context of events to regard it as part of Wallace's explanation and of the concerted negotiations in which they believed they were then engaged.

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[87] The Respondent's evidence as to what the men did during this period is confused and contradictory. In his narrative statement, Wallace somewhat vaguely (in the context of his testimony at that point) stated that the men "hesitated and didn't say anything." In another portion of his direct testimony, he asserted that "nobody said anything during that five-minute period." Apparently still referring to this period, he said a third time that "nobody said anything" after he "asked them if they would go back to work." However, under cross-examination and toward the close of his testimony, he stated that there was some discussion among the men during the interval. Also, during his cross-examination, he agreed that it was when he made his first request that Bennett and another unidentified person said, "That sounds like a fair proposition" and Leander dissuaded them with some remark. Later, in his cross-examination he intimated that this incident occurred after the second request, although he indicated toward the close of his testimony that the colloquy between Leander and the two other employees occurred after the first request. Dieterich evidenced considerable vagueness as to what, if anything, the men said at any point during the meeting after Wallace's first request. Although standing only "six or eight feet" from the men, he repeatedly stated either that he could not hear what they were saying or that they were "mumbling." The only concrete information with respect to what the men said or did that he appeared either willing or able to give was that "it seemed as if they agreed not to go back to work if they didn't get what they were after," apparently basing his assumption on his claim that the men did not respond by returning to work, that "one or two" men (unidentified) "might have" said they were willing to return, and that Leander dissuaded them with the remark, "You all are not going to back down, are you?"

Much of what has been said of the first claimed waiting interval applies with substantially equal force to the Respondent's evidence concerning the second period. While the language of the later request, whether in the various versions given by the employees or those of Wallace and Dieterich, is at least an unmistakable inquiry as to the men's intentions and has disciplinary implications, here, too, there is vagueness, confusion, and contradiction in the Respondent's evidence of what the men did during the interval. Here, also, it is difficult to credit the fact that no response would be made to Wallace during an interval of the
89 claimed duration if such a period actually occurred. In the setting of the second waiting period, even more decidedly than in that of the first, it is difficult to reconcile Wallace's testimony at other places in the record that they did not look angry and were respectful, even at the point of discharge, with an interval of the type involved and its evident import for them.[38]

As pointed out above, the instant case is one in which time estimates are of substantial importance, and one in which the circumstances are such that a man in Wallace's position may be reasonably expected to give some reasonable estimate of a period by which he measured what he claims was an insubordinate refusal to work. To find that a second interval of any measurable duration occurred, one would have to reconcile Wallace's initial estimate of 5 minutes; his concluding estimate of a period "long enough to say yes or no"; his next succeeding statement, "a minute—maybe two"; his characterization of the men's attitude during the interval as one of "hestitation" which is more consistent with a period of short duration than one of 5 minutes, or even 1 or 2 minutes; Dieterich's estimate of 5 minutes; and, finally, Dieterich's failure to mention in his affidavit any time lapse following the purported second request, although he specifically refers in it to a lapse of "a few minutes" after a first request. The difficulties of reconciliation are manifest. For that reason and the others stated above, the Examiner regards the testimony of Wallace and Dieterich concerning a second waiting period for the men to return to work as unreliable, and he does not credit such testimony.

90 The undersigned credits the testimony of the employees that they did not refuse to return to work, and finds that they were not afforded a reasonable opportunity to do so and that they were not insubordinate.

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[38] Toward the close of his testimony Wallace voiced the conclusion that during his second explanation he had "found that they (the men) were very determined. They had made up their minds because they so indicated that they wouldn't work." This is the type of attitude, progressing in emphasis according to Wallace, which would normally result in some expressed viewpoint by at least one or more of the men during a waiting period plainly being used by an employer to put an end to the "determination" described by Wallace.

The conclusion that the employees were discharged for a concerted activities protected by the statute does not turn alone upon a determination that they were not insubordinate. The Respondent intimates in its brief that if the men were not discharged for insubordination, then one must conclude that they were discharged merely for asking for an increase, and that that is an unreasonable conclusion. Such a conception takes inadequate account of the whole context of events and of Wallace's state of mind.

In assaying Wallace's motives, the sequence of events, either expressly developed by the proof or reasonably inferable from it, should be borne in mind. When Elmer Hayden initially broached the subject of the increase to Wallace, the Respondent was already confronted with petitions, then pending with the Board, by two organizations claiming to represent a majority of the plant personnel. Then came the request of the tin shop employees voiced by Elmer Hayden as spokesman. Wallace gave Hayden what he undoubtedly assumed to be a reasonable and conclusive explanation of the basis for refusing to grant the increase. The request by the men in one department for a wage adjustment coming on top of pending petitions for recognition by two organizations, one of which would in all probability seek to bargain for all the men with the company after the election, presented a problem to Wallace. As he phrased it, "I was not in shape to bargain with all of them at the time. * * *" He unquestionably assumed that his reply to Elmer was the end of the matter. As he
91 put it, "I thought that the boys were going to take that as a final answer *and it was my final answer.*" [Italics supplied.]

Then, according to Wallace himself, several events occurred which demonstrate that he had formed a pre-conception of the employees' attitude. Shortly after his conversation with Elmer Hayden, according to his testimony under cross-examination, he "had a report from one of the boys in the shop" (unidentified in the record), who told him that the employees "look like they are fixing to go out there." Wallace asserts that "he did not pay any attention to it" at that point, because he "figured I hear a lot of things." Then, "during the next day I got it from another source (still unidentified) that said I had better do something about it, the boys are fixing to strike." Although characterizing the second report as "still unauthorized—it was shop gossip," Wallace's asserted attitude toward the first report admittedly underwent a change. He testified, "So when I went down there on Thursday (to the meeting) I figured the boys must be ready to pull off this thing they have been talking about." "Pull off what, Mr. Wallace?" he was asked, and he replied, "Pull off a

strike. This was just grapevine gossip but that is why I said we got an inkling of what was going to take place." Then, in response to a question whether his "inkling was that perhaps the men * * * were going to strike," Wallace stated that he "was under that impression."[39]

92 It is clear, that the undersigned so finds, that when Wallace began his meeting with the men in the shop he was at least under the "impression" that a strike was imminent unless he could dissuade them, and that his purpose in coming to the meeting was not so much to repeat the explanation he had given Elmer Hayden but to head off what he thought might be an imminent strike. This is manifest from his statement: "The attitude I had when I approached the men was that I wanted to *soften the men and keep them together* because at that particular time we needed men." [Italics supplied.] It is worthy of note that there is no evidence (aside from Wallace's reference to two sources of information which he did not identify) that prior to the meeting the tin shop employees had indicated by word of conduct that they planned to quit or strike. Each of them (of those called as witnesses) testified that they did not plan to do so.[40] Dieterich, who was their foreman and worked in the shop with them, in response to a question by the undersigned, affirmed that between Elmer's initial talk with Wallace on Monday and the meeting on the following Thursday, he did not hear any of the employees say "that they would quit or go on strike if the increase was not granted." He also agreed that he had not reported any "unrest" in the shop to Wallace.[41] The reports that Wallace asserts he received from sources he did not identify cannot be regarded as credible evidence that the men did, in fact, plan to strike (although the claimed reports and the "impression" he formed from them testify to his state of mind when he met with the men). Significantly, Dieterich heard of no such plans from the men and did not report any "unrest" to

93 Wallace. On the basis of the credible evidence, the undersigned finds that the employees did not plan to strike if their request for a wage increase was refused.

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[39] Although at a later point in his testimony Wallace stated, "Well, I didn't believe it" (that a strike was imminent), it is evident that he was referring to his initial reaction, because he then proceeded to say, "Just like a rumor and then you see something like this so you begin to think there was something to it. So that was the attitude in my mind that maybe there was something to it."

[40] Elmer Hayden testified: "In our discussions (among the men) it was mentioned that we would not go out whether we got a raise or not." Bennett testified to the same effect.

[41] During his testimony, Dieterich referred to some "unrest" in the shop and that "it got out of my control," but it was brought out in his testimony that what he actually meant by "unrest" and what "got out of control" was the desire of the men to have Wallace meet with them and Leander Hayden's statement that if Dieterich would not fetch the superintendent, they would send for him themselves.

Turning to the events of the meeting, it is evident that the employees, on the one hand, and Wallace, on the other, approached it with different attitudes and purposes. The men wanted to hear Wallace's explanation from his own lips and to discuss the requested increase with him. Wallace's purpose was "to soften the men and keep them together" or, in other words, to head off what he thought might be an imminent strike. He made an explanation to the men which they either could not understand or credit, whether because of its technical nature or because they had received an increase the previous year while a petition by the United Steelworkers of America, CIO, for certification was pending and in advance of an election,[42] or because of a combination of reasons. Notwithstanding Wallace's explanations, the employees continued to discuss their desire for a wage adjustment, comparing their wages and respective worth with the men employed in other departments.

There is internal evidence in Wallace's own testimony that, as the meeting progressed, his apprehension that there might be a strike increased with it. His assumptions concerning the inflexibility of the men "about what they wanted" became increasingly fixed in his mind. "When I first went down there," he testified, "I thought the attitude of the men would be slightly ruffled and that they were not determined. After talking to them the first time, I found that they were a little more determined *about what they wanted* than I first thought. In my second talk, I found that they were very determined. They had made up their minds because they so indicated that they wouldn't work." [Italics supplied.][43]

94

Wallace's reference to his discovery that the men were "determined" "about what they wanted" is revealing. It indicates a developing sense of frustration[44] of his original design of dissuading the men from pressing the wage question at that time and demonstrates an assumption by him that the employees were not responsive to his position. Bearing in mind that he had entered the meeting with an "impression" that a strike was imminent, the plain inference to be drawn is that his conclusion

[42] Branch testified that during the meeting one of the men raised the question of the increase the previous year "before the election" and according to Branch, Wallace said that "there wasn't a union pending then," to which a reply was made, "Yes, there was," which in turn drew the response from Wallace, "Well, I don't think there was or I couldn't be sure about it."

[43] It was at this point that Wallace attributed a statement of that purport to Elmer or Leander Hayden under such circumstances, in such a confused manner, and at such a point in the proceeding, that the Trial Examiner does not credit it.

[44] There is also evidence in his testimony that toward the end of the meeting he lost patience with the men. He testified that when he made what he asserts was his second request for them to resume work he had "got to the end of the row."

that the men were "very determined"[45] in pressing the
95 question of the increase must have fortified his preexisting belief in the possibility of a walk-out. It is evident, and the Examiner so finds, that Wallace's interpretation of the attitude of the men fed his preconception concerning their intention to strike until it became a belief that a strike was imminent or, at the least, very probable.[46] Whether Wallace's belief was founded in fact, or even reasonable, is of no moment. The important point is that he had such a belief, and the Examiner finds that he had it immediately prior to his inquiry concerning the men's intentions.

The undersigned finds that, having reached that point, Wallace decided to bring the wage discussions to a definitive conclusion by pointing out to the men the alternative before them and the consequences if they "quit" (strike). The Examiner finds that he did pause momentarily after he asked the men what
96 they "were going to do," but that the pause was not of any measurable duration.[47] It is also found that they did not have a sufficient opportunity to act upon Wallace's inquiry. They had set themselves upon a course of negotiations and had no reason to believe that Wallace had formed a conception that they were going to strike. Having reached the point of Wallace's in-

[45] From his observation of the witnesses and his interpretation of the credible evidence adduced, the Examiner finds that Wallace's claimed assumption concerning the men's persistence was considerably magnified beyond the actual facts which was that the employees simply assumed that they were in a state of negotiation, and had come to the meeting for the purpose of seeking an increase and, failing that, to secure an explanation of Wallace's reasons. The fact that Wallace and Dieterich testified that the meeting lasted 30 minutes is accorded no significance as a measure of the men's "determination." The Examiner finds that the meeting lasted closer to 15 minutes than 30, basing his conclusions not merely on the testimony of the employees, but on finding that the claimed waiting periods did not occur, the extent of the subjects discussed as reflected in the testimony, and the conflict between Dieterich's affidavit (in which he gave an estimate of 20 minutes) and his testimony and that of Wallace. Moreover, the undersigned does not credit the claim that Leander dissuaded two men or "one or two" of them from returning to work. The Respondent appeared to emphasize it in its evidence, yet, Dieterich does not mention it in his affidavit. Moreover, Dieterich was quite vague and evasive about the incident and the surrounding circumstances relating to the conversation and conduct of the men. Wallace's account of the remarks attributed to Leander differs from that of Dieterich, who gave two different versions of Leander's purported statement, but the Examiner attaches no significance to the variances, as he does not expect witnesses to remember the exact text of such a statement. However, the nature of Dieterich's testimony, coupled with some elements of vagueness in Wallace's recollection of the incident, the fact that Wallace attempted to attribute another significant remark to Elmer or Leander which the undersigned does not credit, and his observation of the other witnesses, who expressly deny that any of them made a statement of such purport (except Elmer who said "No; I don't remember," in response to a question about the matter) leads the Examiner to the conclusion that the testimony of Wallace and Dieterich concerning Leander's purported statement is unreliable and not to be credited.

[46] In his narrative version of his remarks toward the close of the meeting, he quotes himself as saying, "Boys I would like for you to stay on, but there is one of two things you can do. You can quit. * * * The other one is you can take this job and go on with it and wait until the outcome of the election. Now what are you going to do?" The use of the word "quit" and its context are significant. It is plainly used as a synonym for "strike." Yet, there is no evidence that a strike had been discussed at any time during the meeting. As already found, there is no credible evidence that the employees had given Wallace any indication that that was their intention. Wallace refers to the preceding part of the meeting as "a friendly discussion." Clearly, what was operating in Wallace's mind was the "impression" with which he had begun the meeting and its development with what Wallace believed to be the employees' persistence, until it became a final conclusion that the men intended to strike unless their request for an increase was granted.

[47] Toward the end of his testimony, Wallace characterized the pause as follows: "They hesitated a little while." This, despite his previous testimony and that of Dieterich that he gave them 5 minutes after his inquiry to make up their minds.

quiry, their position and plans were uncrystallized and inchoate. It is clear that their collective mind had not yet begun to function in reaction to what plainly spelled the end of their hopes for a wage adjustment, at least for some indefinite period to come.

Wallace, who impressed the Examiner as a man of considerable determination and who by that time had lost patience,[48] construed their uncrystallized attitude as intransigence and their failure to respond promptly as part of the plan to strike which he had already imputed to them. To determine exactly how much time elapsed after Wallace's inquiry and his statement that he was "going to make up (their) minds" for the employees would involve an essay into the metaphysical. It is sufficient to say that from the whole context of events it was insufficient for the men to respond with that promptness which apparently Wallace at the moment required, and, acting on his belief that a strike was imminent, he discharged the men before the strike could in fact occur. The Examiner thus concludes that the real motive[49]
97 for the discharge was Wallace's conclusion that the men were intransigent in their request for a wage increase and that they were about to strike if they did not receive it.[50] Whether Wallace's belief was founded in fact is without significance. If he believed that the men were persistent in their demands that they would strike if they met with no success, and if he discharged them for that reason, the discharge contravenes the statute.[51]

There is some intimation in the Respondent's brief that the discharged employees are not entitled to the protection of Section 8 (a) (3) of the Amended Act because they were not a "labor or-

[48] His impatience is demonstrated by his testimony that he had "got to the end of (his) row" after he "told the men to return to work" (which, incidentally, is not what he told them according to his narrative account of the meeting). Wallace also testified that he was "upset" previously. It is quite unlikely that Wallace "got to the end of (his) row" or became "upset" suddenly. Here probably bearing in mind the mental state in which he entered the meeting and its development as it progressed, he was in a state of impatience well before he made his inquiry of the men.

[49] Wallace referred, perhaps unguardedly to the claimed refusal of the men to work as "my main reason" for the discharge. His statement connotes the existence of other reasons. What the "main" reasons were are indicated above.

[50] One revealing incident casting some light on Wallace's real motives may be found in the uncontradicted testimony of Pechon that one employee, Jesse Cutrer, was not even in the room (he had gone to the lavatory during the meeting) at the time Wallace asked the men if they were going to "quit." He did not return until after the discharge. If Wallace's real motive for the discharge was the men's asserted refusal to return to work, it is legitimate to inquire why Wallace made no distinction between Cutrer, who had no opportunity to respond to his inquiry, and the other men. On the other hand, if his motives were as outlined above, the reason for the failure to draw such a distinction becomes clear. The discharge of Cutrer is not wholly consistent with Wallace's claim of insubordination but entirely consistent with the view that the men were discharged for protected concerted activities and Wallace's belief that the men would press their request for an increase to the point of going on strike.

[51] Matter of Red Arrow Freight Lines, Inc., 77 N. L. R. B. 859; Matter of Phoenix Mutual Life Insurance Co., 73 N. L. R. B. 1463.

ganization" within the meaning of that section.[52] This view overlooks the plain definitional language of Section 2 (5) which provides:

> The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the
98 purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

The action of the tin shop group in combining to present a concerted request for a wage increase "constituted them a 'labor organization' within the meaning of the Act" (Matter of Ever Ready Label Corp., 54 N. L. R. B. 551).[53] Nor is it of any consequence, under the facts of this case, that they were a minority group in the plant or members of other labor organizations or that they did not seek to bargain through such organizations.[54] It is unnecessary to examine the inhibitions imposed upon minority groups who are bound by agreement or who are members of a certified bargaining representative actually engaged in bargaining negotiations (cf. N. L. R. B. v. Draper Corp., 145 F. 2d 199 (C. A. 4), for it is well established that, at least under the circumstances here involved, minority groups are entitled to the rights guaranteed by Section 7 and to the protection, in the exercise of those guarantees, afforded by Sections 8 (a) (1) and 8 (a) (3), whether or not they assert those rights through organizations to which they belong.[55]

99 Even if it is assumed that the tin shop group was misguided and uninformed in presenting its wage request when it did, and that Wallace's explanation was a wholly reasonable

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[52] While the Respondent's brief does not expressly make the point, it implies that reinstatement with back pay can be directed only if a discharge of the type involved here violates Section 8 (a) (3) of the Amended Act. This is not so. The Board can exercise its remedial power under Section 10 (c), in order to effectuate the purposes of the statute, if such a discharge offends Section 8 (a) (1). Matter of Rockingham Poultry Marketing Cooperative, Inc., 59 N. L. R. B. 486; Matter of Ever Ready Label Corporation, 54 N. L. R. B. 551; Matter of Sandy Hill Iron and Brass Works, 55 N. L. R. B. 1; Matter of Texas Textile Mills, 58 N. L. R. B. 352.

[53] See also Senate Rept. 573, 74 Congr., 1st Sess., p. 7; Lone Star Gas Co., 52 N. L. R. B. 1058; Sandy Hill Iron and Brass Works, 55 N. L. R. B. 1, enforced 145 F. 2d 631 (C. A. 2); Worthington Creamery and Produce Co., 52 N. L. R. B. 121; Tevren Packing Co., 12 N. L. R. B. 1063, enforced as modified on other grounds, 111 F. 2d 626 (C. A. 9, cert. den. 311 U. S. 668.

[54] The Respondent devotes much of its brief to the citation of authority that the granting of a request for an increase while a petition for certification is pending is a violation of the statute and that an employer is under no obligation to bargain collectively with a minority group of the type involved here, nor while a petition for certification is pending. Without entering into a discussion of the circumstances under which such an increase may offend the statute, or of an employer's obligation to bargain, it should be noted that the company's right to decline to bargain concerning the increase is not an issue in this case, nor is the Respondent charged with a failure to bargain.

[55] N. L. R. B. v. Schwartz, 146 F. 2d 733 (C. A. 5); N. L. R. B. v. Brashear Freight Lines, 119 F. 2d 379, (C. A. 8); N. L. R. B. v. Draper Corp., 145 F. 2d 199 (C. A. 4); Firth Carpet Co. v. N. L. R. B. 129 F. 2d 633 (C. A. 2); Matter of Lone Star Gas Co., 52 N. L. R. B. 1058; Matter of Worthington Creamery and Produce Co., 52 N. L. R. B. 121.

one, such an assumption does not detract in the least from the group's right to present their request, to engage in lawful concerted conduct to further it, and to be protected from discrimination for so doing.[56]

The General Counsel presents the alternative argument that if it is found that the employees refused to return to work such refusal constituted a strike, and as such, a protected activity under the statute. The Respondent urges that there was no strike, but that if it is found that the men refused to return to work and that such refusal constituted a strike, then such a strike "was for an unlawful purpose," advancing the view, among others, that the employees' conduct "technically" constituted a "sit-down" strike and an "unlawful refusal to leave the premises,"[57] and that a strike in the face of the 1947 certification of the United Steelworkers and the pending petitions for certification was a "repudiation (by the employees) of the orderly processes of the Board" and, therefore, unlawful.

The short answer to the alternative positions advanced by both the General Counsel and the Respondent is that no strike or
100 refusal to work occurred.[58] It is thus unnecessary to speculate as to the effect of the United Steelworkers' certification in 1947[59] or of the petitions pending in May 1948 on the men's right to strike. Nor is it necessary to consider either the legality of Wallace's request that the men return to work as an alternative to discharge or of the right of the men to refuse to work while remaining in the plant, in the absence of a request by Wallace that they leave. To do so, would entail a legal discussion which is neither necessary nor germane to the findings made above.

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[56] In view of the finding that the employees were exercising rights guaranteed to them by Section 7, the Examiner does not deem it necessary to consider the rights conferred upon employees by the proviso of Section 9 (a).

[57] The claim that the employees refused "to leave the premises" is wholly without foundation in the evidence. Wallace himself characterized the discussions as "friendly" and the men's attitude as "respectful." He expressly stated that he never did order them to leave the property, and the fact is that they left the plant promptly and peacefully after the discharge took place.

[58] The Respondent does not argue that the cessation of work to hold the meeting in and of itself constituted either a strike or an unlawful work stoppage. The fact is that the men stopped their work to attend a meeting which they reasonably anticipated would take place because Dieterich had gone at their request to call the superintendent to speak to them. He appeared almost immediately and did not rebuke them for suspending their work to meet with him, but, on the contrary, engaged in what he termed a "friendly" discussion with them. Wallace participated in the meeting, and it is clear that he acquiesced in its being held, in fact, using it for his own purpose "to soften men and keep them together."

[59] It is interesting, even if not necessary, to note that in its letter of April 6, 1948, to the United Steelworkers, the Respondent in effect questioned the claim of that Union that it represented the employees covered by the 1947 certification and refused to negotiate a new contract with it unless it presented proof that it represented "the majority of employees." As already noted, the Steelworkers' contract had expired before the tin shop group presented its request to Wallace and met with him, they were all members of other organizations, and the Steelworkers had not up to that point (nor at any time later) participated in the pending representation proceedings. Neither the Steelworkers nor the other two organizations were engaged in collective bargaining negotiations with the Respondent at the time the concerted activities in question occurred.

III. The effect of the unfair labor practices upon commerce

The activities of the Respondent set forth in Section II above, occurring in connection with its operations described in Section I above, have a close, intimate, and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

101 IV. The remedy

Having found that the Respondent has engaged in certain unfair labor practices, and more particularly, that it has violated Section 8 (a) (1) and 8 (a) (3) of the Amended Act, the Examiner will recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent discriminatorily discharged Ellis W. Pechon, Van Buren Bennett, Corydon L. Pechon, J. W. Bankston, Jesse J. Hayden, Leander Hayden, Elmer Hayden, Carl E. Warren, Irving Branch and Jesse Catrer, whether such discharges constitute a violation of Section 8 (a) (1) or Section 8 (a) (3) of the Amended Act, the undersigned will recommend that the Respondent offer the named employees immediate and full reinstatement to their former or substantially equivalent positions[80] without prejudice to their seniority and other rights and privileges and to make them whole for any loss of pay they may have suffered, by reason of the Respondent's discrimination against them, by payment to each of them of a sum of money equal to the respective amounts which they would normally have earned as wages from May 13, 1948, to the date of the offer of reinstatement, less their respective net earnings during such period.[81]

Having found that the Respondent discharged the named employees because they exercised the rights guaranteed to them by Section 7 of the Amended Act, the Examiner will
102 recommend that the Respondent be directed, in any like or similar manner,[82] to cease and desist from interfering with, restraining or coercing its employees in the exercise of the

[80] In accordance with the Board's consistent interpretation of the term, the expression "former or substantially equivalent position" is intended to mean "former position wherever possible, but if such position is no longer in existence, then to a substantially equivalent position." See Matter of The Chase National Bank of the City of New York, San Juan, Puerto Rico, Branch, 65 N. L. R. B. 827.

[81] Matter of Crossett Lumber Co., 8 N. L. R. B. 440, 497-498.

[82] There was no proof that the Respondent had engaged in any other acts of interference, restraint, or coercion than those outlined above, and the Respondent has since negotiated a collective bargaining agreement with a union certified by the Board as a result of the election held on May 28, 1948. Hence the Examiner recommends that the direction to cease and desist from interference, restraint, or coercion contain the limitation, "in any like or similar manner" indicated above.

right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, to the extent provided by law.

Upon the basis of the foregoing findings of fact and of the entire record in this proceeding, the undersigned makes the following:

Conclusions of Law

1. Ellis W. Pechon, Van Buren Bennett, Corydon L. Pechon, J. W. Bankston, Leander Hayden, Elmer Hayden, Jesse J. Hayden, Carl E. Warren, Irving Branch and Jesse Cutrer, in the exercise of their concerted activities, constituted a labor organization within the meaning of the Amended Act.

2. By discriminating in regard to the tenure of employment of Ellis W. Pechon, Van Buren Bennett, Corydon L. Pechon, J. W. Bankston, Leander Hayden, Elmer Hayden, Jesse J. Hayden, Carl E. Warren, Irving Branch and Jesse Cutrer, the Respondent discouraged membership in a labor organization, as defined in the Amended Act, in violation of Section 8 (a) (3) of the said Act, and has interfered with, restrained and coerced the said employees in the exercise of rights guaranteed to them by said Section 7, in violation of Section 8 (a) (1) of the said Act.

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3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Amended Act.

Recommendations

Upon the basis of the above findings of fact and conclusions of law, and of the entire record of this proceeding, the undersigned recommends that Gullett Gin Company, Inc., of Amite, Louisiana, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in any labor organization of its employees, by discharging or refusing to reinstate or in any other manner discriminating against them in regard to their tenure of employment or any term or condition of employment;

(b) In any like or similar manner, interfering with, restraining or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purposes of collective bargaining or other mutual aid and protection as guaranteed in Section 7 of the Amended Act.

104 2. Take the following affirmative action, which the undersigned finds will effectuate the policies of the Act:

(a) Offer to Ellis W. Pechon, Van Buren Bennett, Corydon L. Pechon, J. W. Bankston, Leander Hayden, Elmer Hayden, Jesse J. Hayden, Carl E. Warren, Irving Branch, and Jesse Cutrer immediate and full reinstatement to their former or substantially equivalent positions and to make them whole in the manner set forth in Section IV above, entitled "The remedy";

(b) Post at its plant in Ansite, Louisiana, copies of the notice attached hereto and marked Appendix A. Copies of said notice to be furnished by the Regional Director for the Fifteenth Region after being duly signed by representatives of the Respondent shall be posted by Respondent immediately upon receipt thereof and maintained by it for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees customarily are posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by other material; and

(c) Notify the Regional Director for the Fifteenth Region (New Orleans, Louisiana), in writing within ten (10) days from the receipt of this Intermediate Report and Recommended Order what steps Respondent has taken to comply herewith.

As provided in Section 203.46 of the Rules and Regulations of the National Labor Relations Board—Series 5, as amended August 18, 1948, any party may, within twenty (20) days from the date of service of the order transferring the case to the Board, pursuant to Section 203.45 of said Rules and Regulations,

105 file with the Board, Rochambeau Building, Washington 25, D. C., an original and six copies of a statement in writing setting forth such exceptions to the Intermediate Report and Recommended Order or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and six copies of a brief in support thereof; and any party may, within the same period, file an original and six copies of a brief in support of the Intermediate Report and Recommended Order. Immediately upon the filing of such statement of exceptions and/or briefs, the party filing the same shall serve a copy upon each of the other parties. Statements of exceptions and briefs shall designate by precise citation the portions of the record relied upon and shall be legibly printed or mimeographed, and if mimeographed shall be double spaced. Proof of service on the other parties of all papers filed with the Board shall be promptly made as required by Section 203.85. As further provided in said Section 203.46 should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board

within ten (10) days from the date of service of the order transferring the case to the Board.

In the event no Statement of Exceptions is filed as provided by the aforesaid Rules and Regulations, the findings, conclusions, recommendations, and recommended order herein contained shall, as provided in Section 203.48 of said Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

Dated at Washington, D. C., this 14th day of January 1949.

Herman Marx,
HERMAN MARX,
Trial Examiner.

106 APPENDIX A

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We will not discourage membership in any labor organization of our employees, by discharging or refusing to reinstate or in any other manner discriminating against them in regard to their tenure of employment or any term or condition of employment.

We will not in any like or similar manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purposes of collective bargaining or other mutual aid and protection as guaranteed in Section 7 of the National Labor Relations Act.

We will offer to the employees named below immediate and full reinstatement to their former or substantially equivalent positions without prejudice to any seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay suffered as a result of the discrimination: Ellis W. Pechon, Van Buren Bennett, Corydon L. Pechon, J. W. Bankston,
107 Leander Hayden, Elmer Hayden, Jesse J. Hayden, Carl E. Warren, Irving Branch, Jessie Cutrer.

GULLETT GIN COMPANY, INC.,
Employer.

By _____
(Representative) (Title)

Dated_____

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

(Affidavit or return receipts omitted.)

* * * *

In the United States Court of Appeals for the Fifth Circuit

[Title omitted.]

Certificate of the National Labor Relations Board

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 203.87, Rules and Regulations of the National Labor Relations Board—Series 5, as amended
108 (redesignated Section 102.87, 14 F. R. 78), hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a proceeding had before said Board, entitled, "In the Matter of Gullett Gin Company, Inc. and Ellis W. Pechon, an Individual," the same being known as Case No. 15-CA-53 before said Board, such transcript including the pleadings, testimony and evidence upon which the order of the Board in said proceeding was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

(1) Copy of order designating Herman Marx, Trial Examiner for the National Labor Relations Board, dated October 29, 1948.

(2) Stenographic transcript of testimony taken before Trial Examiner Marx on October 29, 1948, together with all exhibits introduced in evidence.

(3) Copy of petitioner's telegram, dated November 6, 1948, requesting extension of time for filing brief with the Trial Examiner.

(4) Copy of Chief Trial Examiner's telegram, dated November 8, 1948, granting all parties extension of time for filing briefs.

(5) Copies of petitioner's and Chief Law Officers' telegrams, dated November 19 and 22, 1948, respectively requesting further extension of time for filing briefs with the Trial Examiner.

109 (6) Copy of Chief Trial Examiner's telegram, dated November 22, 1948, granting all parties further extension of time for filing briefs.

(7) Copy of order to show cause why certain changes should not be made in the official transcript of the proceedings, issued by Trial Examiner Marx on November 29, 1948, together with copy of affidavit of service thereof.

(8) Copy of order correcting record, issued by Trial Examiner Marx on December 13, 1948, together with copy of affidavit of service thereof.

(9) Copy of Trial Examiner Marx's Intermediate Report, dated January 14, 1949 (annexed to item 14 hereof); copy of order transferring case to the Board, dated January 14, 1949, together with copy of affidavit of service thereof.

(10) Copy of petitioner's telegram, dated February 3, 1949, requesting extension of time for filing exceptions and brief.

(11) Copy of telegram, dated February 7, 1949, granting all parties extension of time for filing exceptions and briefs.

(12) Copy of petitioner's exceptions to the Intermediate Report.

(13) Copy of petitioner's supplemental exceptions to the Intermediate Report.

110 (14) Copy of Decision and Order, issued by the National Labor Relations Board on April 21, 1949, with Intermediate Report annexed, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 19th day of May 1949.

[SEAL]

Frank M. Kleiler,
FRANK M. KLEILER,
Executive Secretary,
National Labor Relations Board.

That thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Fifth Circuit, viz:

Supplemental Petition for Review—Filed January 11, 1950.

U. S. Court of Appeals. Filed Jan. 11, 1950. Oakley F. Dodd, Clerk.

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

No. 12,798

GULLETT GIN COMPANY, INC., PETITIONER

-vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Supplemental Petition for Review and to Set Aside Order of the National Labor Relations Board

To the Honorable the Judges of the United States Court of Appeals for the Fifth Circuit:

Gullett Gin Company, Inc., petitioner, files herewith its supplemental petition in the above matter, for the purpose of directing the Court's attention to the following:

I.

That, as shown by the pleadings and the record in this matter, all filed heretofore, petitioner discharged ten certain employees on May 13, 1948; that as a result of said discharges, the National Labor Relations Board conducted a hearing in the matter which resulted in an Order of the said Board directing, in part, that petitioner offer reinstatement of employment to the ten employees; that the appropriateness and legality of the entire Order of the Board is presently before this Court, by virtue of the other pleadings filed heretofore.

II.

That as will be shown by the affidavit annexed hereto, petitioner, on January 24, 1949, or approximately one year ago from the date of the filing of this supplemental petition, offered reinstatement of employment to the ten employees; that nine of the ten employees accepted reemployment and were returned to work; that the tenth employee, namely Carl E. Warren, although offered reinstatement, declined the offer and gave as his reason the fact that he had obtained employment elsewhere which was more preferable to him; that in offering reinstatement to these employees, petitioner did so

upon advice of counsel and with the purpose of mitigating any damages which it might suffer; and that the said offer of reinstatement was in no way intended to be an acquiescence in the Order of the National Labor Relations Board.

III.

That by virtue of the aforesaid action, that part of the Board's Order, requiring reinstatement of the employees, which Order, in its entirety, the Board has requested this Court to enforce, has become moot and no longer a matter in issue.

Wherefore, the premises and the annexed affidavit considered, petitioner prays that this supplemental petition be accepted and considered by the Court, together with the pleadings filed heretofore by petitioner; that petitioner reaffirms all of its pleadings and brief filed heretofore, and reiterates that the said Order of the Board should be dismissed in its entirety; and that your petitioner be relieved by a decree of this Court from any necessity of complying therewith; and in the alternative, and only in the event that this Court should find that petitioner must comply with the said Order, then that the Order be amended so as to delete and erase any and all references therein to the reinstatement of the discharged employees.

Petitioner further prays for such additional relief as the law, equity and the nature of this case may require.

BALDWIN, HASPEL & MOLONY;
LAWRENCE A. MOLONY;
CONRAD MEYER, III.

By: CONRAD MEYER, III,
Attorneys for Gullett Gin Company, Inc., Petitioner.

STATE OF TENNESSEE,
County of Shelby:

Before me, the undersigned authority, and Notary Public duly commissioned and qualified within and for the County of Shelby and State of aforesaid, personally came and appeared:

J. J. Wallace, who, after being duly sworn did depose and say that he is the plant Superintendent of the Gullett Gin Company's plant located at Amite, Louisiana; that he is the same plant Superintendent who on or about May 13, 1948 discharged ten (10) certain employees in the Tin Shop of the Company's plant, Amite, Louisiana, which discharges have been the subject of litigation before the National Labor Relations Board, and presently before the United States Court of Appeals for the 5th. Circuit.

That on January 24, 1949, under the advice of Counsel in a desire to mitigate any financial damage which the Company might suffer as a result of these discharges, the deponent offered re-instatement of employment, with uninterrupted right of seniority, to the ten (10) men who had been discharged: That all of them accepted dated, January 24, 1949. Nine (9) of the ten (10) men accepted the offer of reinstatement and returned to work: That the tenth man, namely, Carl E. Warren, altho' offered reinstatement declined to accept it and gave as his reason that he had obtained other employment which he preferred to keep: That the offer of reinstatement to the ten men was not done in acquiescence with the Order and decision with the National Labor Relations Board in this.

(S.) J. J. WALLACE,
J. J. WALLACE,
Superintendent.

Sworn to and subscribed before — on this 9th. day of the month of January 1950. My Commission expires Apr. 15, 1951.

(S.) JAMES R. COLLEY, *N.P.*

Argument and Submission

Extract from the Minutes of January 11, 1950.

No. 12798

GULLETT GIN COMPANY, INC.

versus

NATIONAL LABOR RELATIONS BOARD

On this day this cause was called, and after argument by Conrad Meyer III, Esq., for Petitioner, and I. J. Gromfine, Esq., Attorney, National Labor Relations Board, for Respondent, was submitted to the Court.

Opinion of the Court—Filed January 30, 1950.

In the United States Court of Appeals for the Fifth Circuit

No. 12798

GULLETT GIN COMPANY, INC., PETITIONER

versus

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Petition for Review of an Order of the National Labor Relations Board, sitting at Washington, D. C.

(January 30, 1950.)

Before: HUTCHESON, HOLMES and MCCORD, Circuit Judges.

HUTCHESON, *Circuit Judge:*

While the order sought to be enforced contains provisions ordering the respondent to cease and desist from (a) discouraging membership in any labor organization and (b) interfering with, or coercing, its employees in the right of self organization, these are merely secondary or incidental provisions of the order. Its prime provisions are those requiring respondent to offer reinstatement to, and make whole, ten tinsho employees [1] because of the discrimination against them charged and found.

Unlike the situation obtaining in the usual case of claimed discriminatory discharges, there is no claim here that these persons were discharged on account of their activity in favor of or against a particular union or labor organization which had organized, or was campaigning to organize, the plant. The primary claim made and supported by evidence is that, while in the course of taking in their own behalf concerted activity for the mutual aid or protection of the employees involved, activity protected by Sec. 7 of the Labor Management Relations Act, the named persons were peremptorily discharged in violation of their rights under the act and contrary to the duties and obligations of their employer, and that such discharges constituted an unfair labor practice in violation of Sec 8(a)(1) of the act.

As a further and independent ground of decision, the Board found: that these employees, assembled for the purpose of gaining

[1] Ellis W. Pechon, Van Buren Bennett, Corydon L. Pechon, J. W. Bankston, Leander Hayden, Elmer Hayden, Jesse J. Hayden, Carl E. Warren, Irving Branch, and Jesse Cutrer.

a raise in wages, constituted a labor organization as defined in Sec. 2(5) of the act; that their discharge amounted to a discrimination in the terms of hire or tenure of employment, discouraging membership in such organization; and that it was, therefore, in violation of Sec. 8(a)(3) of the act.

The respondent, admitting that the men were discharged, urges upon us that, upon the undisputed evidence, they were discharged for insubordination in refusing to obey the order of their employer to return to work and not in the course, and because, of the exercise of rights guaranteed to them under the act.

The Board found that there was no insubordination, no refusal to obey orders to return to work, in fact, no positive orders of that kind given, and that their discharge, coming, as it did, in the course of a meeting arranged between the representative of the employer and these tin shop employees for the purpose of discussing wages, was a discharge in violation of the rights guaranteed by the act.

Contesting the findings of the Board, the respondent insists, first, that while it is true that their discharge occurred at the end of a conference, invited by the employees to discuss a wage demand, the discharge had nothing to do with the demand itself. It was based upon the employees' refusal to go back to work when told to do so after the employer had explained that, because of a pending representation election in the plant, it could do nothing about the demand, and the discussion had come to an end.

The Board did not accept this version of what occurred as a correct one. Neither do we. While different participants tell the tale of the occurrence differently, these differences are not material. Indeed on what we regard as the controlling issues in the case, there are no differences.

The record shows, without conflict; that the meeting was arranged for and held in the shop; that there was a discussion at the meeting; that Wallace, for the respondent, patiently and carefully explained that he could do nothing, on account of the pending election for representation, about the demand; and that instead of accepting this statement without demur, the employees persisted in trying to further discuss the question with him.

According to Wallace's own testimony, this is the way the discharges came about. After he had finished explaining the situation and the men had made no move in acceptance of it, he said, "Boys, I would like for you to stay on, but there is one of two things you can do. You can quit, and if you quit, you are going to lose your seniority and you wont be able to vote in this election. The other one is, you can take this job and go on with it, and wait until the outcome of the election. Now what are you going to do?" "They waited a while, and they didn't [*sic*] what to do. There was not a

murmur out of anyone. I said, 'Well, Boys, I am not sure that we can have you sitting around on tables and not having you do anything. I am afraid I will have to make up your minds for you. I am going to fire you and all of you consider yourselves fired as of this date.'"

Witnesses for the men gave a little different version of the conversations and differed a little from Wallace as to the time given the men to answer his question, Wallace putting it at 5 minutes, some of the men putting it as practically no time at all.

This difference, however, is not at all material. The question put peremptorily was not, under the circumstances a fair question. But if it had been, this would not help respondent because the employees were not permitted to answer it. As Wallace testified, he answered it for them. In the light of this record, and particularly as made by Mr. Wallace's own testimony, respondent's contention that there was insubordination or refusal to obey an order must be rejected as wholly unsubstantiated. No order was given, no order was disobeyed. The discharges were not reasonable. They were arbitrary and unreasonable.

In addition to its contention that the Board's findings of fact, that the men were not discharged for insubordination, are not supported, the respondent makes the further contention that, assuming that the men were discharged for failure to accept their employer's reasons for not granting a wage demand, this would not violate the National Labor Relations Act as amended. In support of this view, respondent, relying upon well established law that an employer may discharge an employee for any reason, reasonable or unreasonable, so long as it is not for a reason prohibited by the act, insists that, conceding that the discharges were arbitrary and unreasonable, they were not for reasons the act prohibits.

Correctly insisting that, if an employer discharges his employees in a moment of anger or caprice, but not because of activities guaranteed under, or for reasons prohibited by the act, such discharges are not unfair labor practices, respondent argues that, at the worst for it, no more than that can be found here.

We cannot at all agree. This argument proceeds upon a premise which has already been rejected. This premise is that the employees refused to work under the conditions which had been prescribed by the employer, that is, that there would be no raises at this time, and that they were discharged for that refusal. One difficulty with the point here, the same which presented itself when it was made earlier, is that the employees did not refuse to work. A further difficulty with it is that while a discharge in caprice or anger is not in and of itself a violation of the act, if that caprice or anger arises out of, or may be reasonably attributed to, resentment against employees for pressing their rights under the act, the act specifically makes such discharges unfair labor practices.

All that occurred, occurred in the course, and as a result, of the effort of the men to obtain a raise in wages. A discussion followed. A peremptory question was put to them. They were not allowed to answer it. The employer answered it for them. And because they did not answer with the celerity the employer desired, they were fired out of hand.

Upon the clearest principles, these discharges were in the course, and because, of their engaging in activities protected by the statute. They were prohibited by, and the respondent was guilty of a violation of, Sec. 8(a)(1) of the act.

The order requiring reinstatement of the men discharged and making them whole is fully supported by evidence, and the petition to enforce it is granted.

This being so, it is not greatly important whether the board was correct in its supporting or ancillary finding that there was also a violation of Sec. 8(a) (3), but the matter is directly presented for our decision, and, without laboring the point, we hold that, in so finding and holding, the Board was wrong.

The evidence makes it perfectly clear that there was no difference or dispute, between the employer and the discharged employees, as to what union or organization they had joined or should join, or should represent them. Nothing in the whole discussion remotely points to a difference between them arising out of, or traceable to questions of joining or not joining any particular labor organization. Certainly they were not discharged because they demanded or showed preference for one organization over the other or for the purpose of discouraging membership in any. Certainly they had a right to present their grievances in a body as they did. *N. L. R. B. v. Schwartz*, 146 F(2) 773. It is to say, though, that no question of who should represent them or of discouraging membership in any particular organization was in any way involved. Enforcement of the cease and desist portion of the order, Sec. 1(2) and (b) will, therefore, be DENIED.

There remains for consideration only the respondent's complaint that in holding and ordering that respondent could not deduct, from any back pay award, such amounts of money as have been received by any of the discharged employees from the Louisiana Workmen's Compensation, the Board erred. On the authority of *Republic Steel Corp. v. N. L. R. B.*, 311 U. S. 7, we agree with respondent.

We do not agree with the view of the majority in *N. L. R. B. v. Marshall Field & Co.*, 129 F(2) 169, that such a holding and order was a lawful and proper one for the Board to make. In the Per Curiam opinion of the Supreme Court, in *Marshall Field & Co. v. N. L. R. B.*, 318 U. S., 254, the Supreme Court makes it clear that, while affirming the judgment on procedural grounds, it did not give its approval to that holding.

The decree to be presented enforcing Sec. 2(a)(b) and (c) of the order will, therefore, be qualified by providing that any such moneys so received may be deducted in determining back pay awards.

Modified and enforced.

JUDGMENT

Extract from the Minutes of January 30, 1950

No. 12798

GULLETT GIN COMPANY, INC.

versus

NATIONAL LABOR RELATIONS BOARD

This cause came on to be heard on the petition of Gullett Gin Company, Inc., for a review of an order of the National Labor Relations Board, made on April 21, 1949, "In the matter of Gullett Gin Company, Inc., and Ellis W. Pechon", Case No. 15-CA-53, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree to be presented enforcing Sec. 2(A)(B) & (C) of the order will be qualified by providing that any such moneys so received may be deducted in determining back pay awards, and as so modified that the order of the National Labor Relations Board in this cause be, and the same is hereby, enforced.

Motion to Extend Time to File Petition for Rehearing. Filed February 23, 1950.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 12798

GULLETT GIN COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Motion for Extension of Time Within Which to File Petition for Rehearing

The National Labor Relations Board, by its Assistant General Counsel, respectfully petitions this Court to extend the time within which the Board may file its petition for rehearing from Febru-

ary 20, 1950 to March 6, 1950. In support thereof it shows as follows:

1. The Board's petition for rehearing is now at the Government Printing Office, but due to its heavy volume of work and the intervening holiday and week ends, the printer will not be able to deliver the final printed copies of the petition to the Board before the latter part of this month or early part of March.

WHEREFORE, the Board prays that the Court grant its motion and extend the time within which the Board may file its petition for rehearing from February 20, 1950 to March 6, 1950.

(S.) A. NORMAN SOMERS,
Assistant General Counsel,
National Labor Relations Board.

Dated at Washington, D. C., this 17th day of February 1950.

Order Extending Time to File Petition for Rehearing. Extract from the Minutes of February 23, 1950,

No. 12798

GULLETT GIN COMPANY, INC

versus

NATIONAL LABOR RELATIONS BOARD

On consideration of the motion filed by respondent to extend the time to file a petition for rehearing;

It is ordered that the respondent be granted until March 6th, 1950 to file a petition for rehearing in this case.

Petition for Rehearing Filed. March 6, 1950.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 12798

GULLETT GIN COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petition to Review and Set Aside and on Request for Enforcement of an Order of the National Labor Relations Board

Petition of the National Labor Relations Board for Rehearing

The National Labor Relations Board respectfully requests a rehearing of the Court's decision on January 30, 1950, insofar as it held that the Board had exceeded its powers under the Act in

determining that respondent could not deduct, from any back pay award, such amounts of money as have been received by the discharged employees from the Louisiana Unemployment Compensation Fund. Since this issue was not covered in the oral argument, and treated only fragmentarily in the brief, the Board respectfully requests permission to amplify its position on that issue.

1. The Board's determination that unemployment compensation benefits are not deductible in computing back pay is within its competence under the Act

A. The Board's determination effectuates the policies of the act

Section 10 (c) of the Act authorizes the Board, upon finding that any person has committed an unfair labor practice, to require him "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." The Board and the courts have uniformly recognized that the purpose of Congress in empowering the Board to award back pay was not to provide a system for securing private rights to employees but to provide a method of enforcing the policies of the Act in the public interest.[1] *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 48-49; *Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177, 197; *Agwilines, Inc.*, v. *N. L. R. B.*, 87 F. 2d 146, 151 (C. A. 5). It is well settled that the formulation of the particular remedy necessary to effectuate the policies of the Act is the Board's responsibility in the first instance and that its determinations in this regard are not to be set aside unless the Board has abused its discretion under the Act. *N. L. R. B.* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 270; *International Association of Machinists* v. *N. L. R. B.*, 311 U. S. 72, 82. As stated in *Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177, 194:

> A statute expressive of such large public policy as that on which the National Labor Relations Board is based must be broadly phrased and necessarily carries with it the task of administrative application. There is an area plainly covered by the language of the Act and an area no less plainly without it. But in the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review.

[1] H. Rep. No. 1147, 74th Cong., 1st Sess., p. 24.

It is submitted that the Board's determination in the instant case that deductions can be made for "earnings", but not for "unemployment compensation benefits" is a reasonable exercise of the Board's discretion to frame the appropriate remedy to effectuate the policies of the Act.

While the primary objective, where the unfair labor practice takes the form of a wrongful discharge, is not to vindicate the private rights of the men, but the public policy of the Act through the restoration of the employees' *status quo*, the Board has found it helpful to apply some of the concepts used in remedying private wrongs. One effect on the employee of a discharge for union activity is to deprive him of an opportunity to earn a living. An obvious measure of the wrong is the value of the opportunity denied, which is, of course, the salary he would otherwise have earned if he had not been wrongfully discharged. The Board has therefore consistently used the "loss of earnings" rule in restoring the *status quo* of the individual employee, properly allowing, as a deduction from the back pay awarded, "earnings" received prior to reinstatement from other employers, whether public [2] or private.

The decision of the Court herein, in effect, upholds petitioner's contention (Brief, pp. 27-33) that the deduction of earnings was not enough—that the Board must also permit it to deduct collateral benefits, in the form of unemployment compensation,[3] received by the employees. To do this would logically and equitably require that the Board consider collateral losses incurred by the employees as well. For, it manifestly would not effectuate the purposes of the Act to apply the rule least favorable to the employee in determining what losses to compensate and to apply the rule most favorable to the employer in determining what benefits to deduct. Thus, the decision of the Court assumes that the Board can best effectuate the Act by considering all losses and all benefits arising out of the wrongful discharge and resulting unemployment, and awarding the employee the amount which will make him whole, not for pay lost, but for all losses.

However, a consideration of both collateral benefits and losses during the period of the unlawful discharge would involve the substitution of an "absolute loss" rule for the "loss of earnings" rule in restoring the *status quo*. Such a standard or rule would not only be impossible of actual attainment, but would present great practical difficulties in administration. It would require the Board to take into account the different types of collateral benefits,

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[2] *Republic Steel Corporation* v. *N. L. R. B.*, 311 U. S. 7.

[3] Petitioner, in contending that collateral benefits must be deducted in the same manner as earnings, does not contend that these amounts are, in fact, earnings. Indeed, it is well settled that they are not. *Marshall Field & Co.* v. *N. L. R. B.*, 318 U. S. 253, 255.

such as contributions from friends, relatives, charities, union benefits, and income in whatever form and of whatever nature (including food) which would not have been received but for the discharge. On the other hand, the Board would also have to explore and give weight to the many types of collateral losses, both tangible and intangible which the employees suffered because of their unemployment. This might cover a wide range of subjects. For while back pay (sometimes received years later) arithmetically compensates employees for lost earnings, it does not fully eradicate the losses, financial and otherwise, of having been for long periods without a job. Wrongfully discharged employees may be forced to make distress sales of property, to mortgage and then lose homes and cars, to borrow money at loan-shark rates, to undergo impairment of physical and mental health, and otherwise to suffer collateral, but nevertheless serious, losses and damage.

The results achieved through the investigation of such complex and obscure factors would hardly justify the difficulties encountered in arriving at them. As we show more fully hereafter, *infra*, pp. 10-11, the "loss of earnings" rule is the measure of damages in ordinary common law tort actions involving loss of the opportunity to work, and the courts in such action are not required to consider collateral benefits received from other sources in mitigation of damages. It is submitted that it can hardly be claimed that the Board acts arbitrarily in applying the well-settled rule at common law governing similar situations.

Furthermore, an attempt to determine "absolute loss" would involve the making of adjustments which would enmesh the Board in the administration of other laws and result in an effort to effectuate the policies of such statutes as well as of this Act, a practice which was condemned by the Supreme Court in connection with work-relief laws in *Republic Steel Corporation* v. *N. L. R. B.*, 311 U. S. 7, relied on by this Court in the instant case, and discussed more fully below, pp. 14-15. One specific example illustrates this point. Under the Louisiana Unemployment Compensation Law, when an employee collects the maximum number of benefit payments to which he is entitled during the benefit year, his right to collect benefits is completely exhausted for that year.[4] In a case where an employer reinstated a wrongfully discharged employee who had received his maximum number of benefit payments, giving him back pay less the amount of the benefit payments, the employee would not have been made completely whole. If he were subsequently the victim of a bona fide lay-off for lack of work during the same benefit year, he would then be unable to collect unemployment benefits, his rights having already been exhausted for that year. Yet,

[4] *Dart*, Louisiana General Statutes Annotated, 1949 Supp. § 4434.2 (d). See appendix, *infra*, pp. 21-22.

if the Board were to direct the employer to reimburse the State out of the back pay, for the benefits paid during the period of the wrongful discharge, in order to restore the employee's right to benefits, the Board would be concerning itself with the administration of a statute other than its own. Serious questions would arise concerning the possibility of reimbursement, restoration of benefits, etc., under the Louisiana law, and the Board would face an impossible job in trying to reconcile and effectuate the policy of this Act and the Louisiana Unemployment Act in attempting to restore the *status quo* on a basis of "absolute loss." The Board has, therefore, left the problem of the proper adjustment of collateral benefits of this type, in the case of a back-pay award, to the individual States. In determining what deductions from back pay would be appropriate, "it is enough," as stated by the Court in *N. L. R. B.* v. *Brashear Freight Lines, Inc.*, 127 F. 2d 198, 199 "that [the employer] is permitted to deduct what [the employees] earned as wages."

B. The limitation of deductions from back pay to interim earnings, not inclusive of collateral benefits such as unemployment compensation, is not punitive

Petitioner contended (Brief, pp. 31-32) that since the employees would receive back pay plus unemployment benefits the Board's order imposed a penalty, in that it required it to make the employees more than whole. This contention is unsound for several reasons.[5]

First, there is no certainty that an employee will ultimately retain both the back pay and the benefits. The State may provide for reimbursement by an employee of the benefits, for example through the operation of a statute [6] or through administrative practice.[7] Or, if at the end of the year, there has been no other period of unemployment, an employee may feel a moral obligation to repay the benefits to the State. Secondly, even if it be assumed that an employee would ultimately be able to retain the benefits, it does not follow that the retention of this one collateral benefit would in fact make

[5] While the Board, as a matter of administrative discretion, has provided for deduction from back pay of earnings at other employment, Section 10 (c) does not, in terms, require the Board to make provision for any deduction whatever.

[6] For example, Indiana formerly had a statutory provision requiring employees awarded back pay under the National Labor Relations Act to reimburse the State for unemployment compensation benefits received (Burns Indiana Statutes Annotated, 1933, Supp. June 1942 § 52-1505 (f) and 1506 (f) (4) (iv)).

[7] Cf. the practice of Pennsylvania to require relief beneficiaries to make wage assignments to the Commonwealth. *N. L. R. B.* v. *Stackpole Carbon Co.*, 128 F. 2d 188, 189 (C. A. 3).

the employee "more than whole." The one collateral benefit in the instant case might easily be outweighed by the many collateral losses discussed above, p. 5.

Thirdly, the courts have repeatedly been confronted with the question whether a statute is penal when it prescribes as compensation to an employee for wrongful discharge, an amount arbitrary in character and larger than the wages which would have been earned for the period covered, and they have uniformly held such awards to be remedial, not penal. In so holding, the courts have pointed out the difficulty of measuring in terms of ordinary wages the total loss suffered by an employee who is left for a period of time without his usual source of income, and have held that the establishment of a rate of recompense of double the amount of wages wrongfully withheld, or a month's wages without regard to how short a period the employee was out of work, was a reasonable method of effectuating a remedy, and did not constitute a penalty. Thus, the Supreme Court has held that Section 16 (b) of the Fair Labor Standards Act (52 Stat. 1060, 1069, 29 U. S. C. 201, 216 (b)), which provides that an employer who violates the minimum wage and maximum hour provisions of the Act "* * * shall be liable to the employee or employes affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, *and in an additional equal amount as liquidated damages* * * * [italics supplied]" is not penal in nature. *Overnight Motor Transportation Co. Inc.* v. *Missel*, 316 U. S. 572, 583; *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697, 707.[8]

As stated by the Supreme Court of Ohio in a case also brought under the Fair Labor Standards Act: "A law is not penal merely because it imposes an extraordinary liability on a wrongdoer in favor of a person wronged, which is not limited to the damages suffered by him." *Floyd* v. *DuBois Soap Co.*, 139 Ohio St. 520, 41 N. E. 2d 393, 395.

Fourth, petitioner's contention would be equally unsound if the primary objective were the fixing of compensatory damages to make whole the victims of a private wrong rather than the vindication of a public policy. For, even in the ordinary common law field of private tort or contract action involving loss of employment, it is clear that the award of back pay in full under such circumstances constitutes only the usual remedial damages, not

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[8] See also *Cox* v. *Lykes Brothers*, 237 N. Y. 376, 379, 143 N. E. 226; *Calvin* v. *Huntley*, 178 Mass. 29, 59 N. E. 435; cf. *Robertson* v. *Argus Hosiery Mills, Inc.*, 121 F. 2d 285, 286 (C. A. 6), certiorari denied 314 U. S. 681; *Hargrave* v. *Mid-Continent Petroleum Corp.*, 36 F. Supp. 233, 235 (E. D. Okla.); *Lorenzetti* v. *American Trust Co.*, 45 F. Supp. 128, 139, 140 (N. D. Calif.); *Brady* v. *Daly*, 175 U. S. 148, 153-155; *Turner Lumber Co.* v. *C. M. & St. P. Ry.*, 271 U. S. 259, 262.

punitive damages. Actual earnings in other employment are deductible, but *benefits* received from third parties are not considered in arriving at the proper measure of damages. Thus, it is stated in *Williston On Contracts* (Rev. Ed. 1937), sec. 1358, that

> * * * in an action by the employee against the employer for a wrongful discharge, a deduction of the net amount of what the employee *earned*, or what he might reasonably have earned in other employment of like nature, from what he would have received had there been no breach, furnishes the ordinary measure of damages.

The same rule applies in actions against tort feasors, and it is simply stated in Restatement of the Law of Torts, Sec. 924, Comment (c):

> The damages [for loss of earnings] are not reduced by the fact that the plaintiff has suffered no net financial loss as the result of the entire transaction, as where he receives insurance money or an amount equal to his lost wages from his employer or from a friend.[9]

Authorities hold that this doctrine applies, regardless of whether the benefits received by the plaintiff take the form of wages from his employer under a contract of employment,[10] gifts,[11] receipts from an insurance policy,[12] or workmen's compensation insurance or benefits.[13]

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[9] See also, Restatement, Sec. 920, noting comment (e).

[10] *Shea* v. *Rettie*, 287 Mass. 454, 458-459; *Elmer* v. *Fessenden*, 145 Mass. 427, 428-429; *Hoobler* v. *Voelpel*, 246 Ill. App. 69, 78-79; *Cooney* v. *Hughes*, 340 Ill. App. 371, 378.

[11] *Hayes* v. *Morris & Co.*, 98 Conn. 603, 607-608; *Campbell* v. *Brandenberger*, 35 Del. 203, 209; *Nashville, etc., Ry. Co.* v. *Miller*, 120 Ga. 453, 457; *The Ohio etc.* v. *Dickerson*, 59 Ind. 317, 324; *Williams* v. *St. Louis, etc. Ry. Co.*, 123 Mo. 573, 585; *Illinois Cent. R. R. Co.* v. *Porter*, 117 Tenn. 13, 22-23.

[12] *Cox* v. *City of Chicago*, 83 Ill. App. 540, 542; *Louisville, Etc., R. R. Co.* v. *Carothers*, 23 Ky. L. Rep. 1673, 1674; *Rusk* v. *Jefferies*, 110 N. J. L. 307, 311; *Littman* v. *Bell Telephone Co.*, 315 Pa. 370, 381; *Heath* v. *Seattle Taxicab Co.*, 73 Wash. 177, 186.

[13] *Chicago, etc. Ry. Co.* v. *Peeler*, 140 F. 2d 865, 868 (C. A. 8); *Overland Const. Co.* v. *Sydnor*, 70 F. 2d 338, 340 (C. A. 6); *Liggett & Myers Tobacco Co.* v. *DeParcq*, 66 F. 2d 678, 687-688 (C. A. 8); *Pappas* v. *B. & O. R. R. Co.*, 37 F. 2d 271, 272 (C. A. 6); *Sprinkle* v. *Davis*, 111 F. 2d 925, 931 (C. A. 4). It will be noted that taxing authorities similarly group gifts, workmen's compensation benefits, and proceeds of insurance policies in a special category, exempt from taxation.

Thus, even under the common law rule of damages the mere fact that the total receipts of the discharged employees may exceed what they would have been had there been no unlawful discharge, by reason of the receipt of unemployment compensation benefits, does not render the order punitive.[14] By parity of reasoning the award of lost pay without deduction of collateral benefits, which is compensatory when made by a court or jury, does not become punitive when made by the Board.

Petitioner also argued before the Court (Brief, p. 33), that the order is punitive since it has paid the employees through its payments into the State Unemployment Compensation Fund, and that to require it to pay them back-pay without the deduction of the benefits they have already received, would be to require it to pay twice. The argument is fallacious on several grounds. One answer lies in the fact that the benefits are paid by the State out of a pooled fund, not by petitioner. Although State law may characterize the employer's payments made to an unemployment compensation fund as "contributions," and although the State has chosen to raise the fund by levies only on employers rather than on the general public, the Supreme Court has recognized that the employers' contributions are none the less "taxes." *Carmichael* v. *Southern Coal Co.*, 301 U. S. 495, 508-509; *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 578-583. Plainly taxes exacted by the State are not insurance premiums tendered by petitioner. As stated by the Court in *N. L. R. B.* v. *Marshall Field & Co.*, 129 F. 2d 169, 173 (C. A. 7), "The benefits in question were paid by the State, not by [petitioner]. How the State raised the funds is a matter between the State and its taxpayers." While petitioner has in some measure contributed to the fund from which the unemployment compensation benefits are paid by paying the pay roll taxes levied against it, petitioner has paid no more than it would have had to pay had there been no discharges. In sum, petitioner is not required to do anything which it would not have been required to do had it committed no unfair labor practices.

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[14] Cf. *Allyn* v. *Abad*, 81 F. Supp. 140 (D. C. N. J.) in which the court held that an employer in computing back pay due a veteran under Selective Training and Service Act (50 U. S. C. App. § 308) for having wrongfully denied him reemployment was not entitled to deduct benefits received under Unemployment Readjustment Allowance Act (38 U. S. C. A. § 696). As stated by the Court (81 F. Supp., at 141):

"It is my thought that the payment, under the Unemployment Readjustment Allowance Act, is in the nature of a gratuity, and, as such, the employer is in no position to receive any benefit therefrom by way of reduction in the amount to be awarded to the veteran."

Petitioner is in effect claiming that its payments of unemployment compensation taxes entitle it to an interest in the distribution of unemployment benefits. Petitioner attempts to justify this claim by asserting (Brief, p. 32) that benefits paid the discharged employees may adversely affect its "favorable experience rating record" and in turn its tax rate.[15] However, petitioner has no more interest in the distribution of these tax funds than in the disbursement of any other state funds. The New York Court of Appeals in the case of *Matter of Cassaretakis*, 289 N. Y. 119, 44 N. E. (2d) 391, affirmed 319 U. S. 306, considered the nature of the New York unemployment compensation law and sharply distinguished the relations thereunder from the type of contractual relationship which would give the employer a special interest in the benefits. Since the Louisiana law is similar to the New York law in respects here pertinent, that Court's observations merit quotation here (44 N. E., at 394-395):

> This tax is an excise based upon the exercise of the privilege of employing individuals. * * * The obligations of the employer under this law are not to his employees but to the State. Likewise, claimants of benefits assert their rights against the State and not against the employer. The employer's duty to pay contributions and the employee's right to receive benefits are independent of each other. The employer must continue to pay the tax although none of his employees ever becomes entitled to benefits through lack of employment; the employee has a right to receive benefits upon becoming unemployed although his employer has failed to contribute.

Petitioner cannot therefore find any support for its position by reason of a showing that it pays the wage tax from which source the Louisiana Unemployment Compensation Fund is built up.

Republic Steel Corporation v. *N. L. R. B.*, 311 U. S. 7, does not support the contention that the Board's order was punitive. That case did not involve the question of the deductibility of collateral benefits from back pay. It dealt instead with "earnings." As the Court stated (p. 9):

> The amounts earned by the employees before reinstatement were directed to be deducted from their back pay manifestly because, having already been received, these amounts were not needed to make the employees whole. That principle would apply whether the employees had *earned* the amounts in public

[15] It should be noted that petitioner makes no effort to show even approximately the extent to which its taxes might be affected by the benefits paid to the employees in question.

or private employment. Further, there is no question that the amounts paid by the governmental agencies were *for services actually performed.* Presumably these agencies, and through them the public, received the benefit of services reasonably worth the amounts paid. [Italics supplied.]

And the question was not whether wages earned on work relief were deductible from back pay. The Board made them deductible from the employee's back pay by its own order. But the Board also required the employer to compensate the work-relief agencies to the extent of the monies which they paid. This, the Court said the Board could not do, first because the work-relief agencies sustained no loss in that they were already compensated by the services which the work-relief recipient rendered, and, secondly, because in seeking to compensate, not the employee, but the work-relief agency, the Board was, in effect, furthering, not the policies of the Labor Act, but of another law—the very effect which is sought to be avoided here, pp. 6-7.

C. Congress' reenactment of Section 10 (c) of the Act indicates approval of the Board's determination that unemployment and other collateral benefits are not deductible in computing back pay

The Board, for a period of over 10 years, has consistently followed a policy of refusing to permit deduction from back-pay awards, of any type of benefits or payments received from third-party sources other than actual earnings.[16] Standing alone, this policy would be entitled to great weight because of the presumption which obtains in favor of the correctness and validity of administrative findings and determinations by reason of the fact that they come from tribunals specially competent to deal with problems requiring specialized knowledge of facts "generally unfamiliar to a judicial tribunal." *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, 485; *Federal Trade Commission* v. *Keppel & Bro., Inc.*, 291 U. S. 304, 314.

However in this case an even greater weight is added to the Board's interpretation of the Act by the reenactment of Section 10

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[16] *Vegetable Oil Products Co., Inc.*, 5 N. L. R. B. 52, 53; *Oil Well Mfg. Corp.*, 14 N. L. R. B. 1114; *Missouri-Arkansas Coach Lines, Inc.*, 7 N. L. R. B. 186, 206; *Berkshire Knitting Mills*, 17 N. L. R. B. 239; *Lone Star Bag & Bagging Co.*, 8 N. L. R. B. 244, 262; *Sterling Corset Co., Inc.*, 9 N. L. R. B. 858, 871; *Mt. Vernon Car Manufacturing Co.*, 11 N. L. R. B. 500, 565; *West Kentucky Coal Co.*, 10 N. L. R. B. 88, 128; *Louis Hornick & Co., Inc.*, 2 N. L. R. B. 983; *Jefferson Lake Oil Co., Inc.*, 16 N. L. R. B. 355, 405; *Walter Stover*, 15 N. L. R. B. 635; *Pennsylvania Furnace and Iron Co.*, 13 N. L. R. B. 49; *Rockwood Stove Works*, 63 N. L. R. B. 1297, 1299.

(c) of the Act with no change in the portion here involved, although, as is well known, Congress subjected the entire Wagner Act, including Section 10 (c),[17] to close scrutiny and amended those sections, the interpretation of which it desired to change. Moreover, it is clear that Congress was informed of the interpretation put on Section 10 (c) in regard to deductions to be made from back pay. For, not only has the Board handed down numerous decisions to this effect over a long period of years, *supra*, but under the mandate of the Statute (Section 3 (c)) in making its annual reports to Congress concerning its administration of the Act, the Board notified Congress at the time it adopted such a policy and on two other occasions, one immediately preceding the amending of the Act, that "Home-relief payments and unemployment compensation are not deducted at all from back pay either in the form of net earnings or as amounts to be paid to the governmental agency which made the payments." At the same time the Board distinguished amounts earned on work relief projects, a subject treated in *Republic Steel Corporation* v. *N. L. R. B.*, 311 U. S. 7, stating that "Insofar as the employee receives remuneration for such work upon a relief project during periods when he would otherwise have been working for the respondent, it would not seem necessary, in restoring him to the status quo, that he be reimbursed in such amounts." National Labor Relations Board, *Fourth Annual Report* (Gov't Print. Off. 1940), p. 100, n. 25; *Tenth Annual Report* (1946), p. 52; *Eleventh Annual Report* (1947), p. 50.

Absent a clearly defined legislative intention to the contrary, the construction of a statute placed on it by judicial and administrative interpretation is presumed to be adopted by the legislature when the statute is amended and reenacted. *The Construction of Statutes*, Crawford (1940), § 233. "The rule has special force when it is known that the legislature is acquainted with the contemporaneous interpretation made by an administrative body charged with the duty of administering or enforcing the statute." *Statutory Construction*, Sutherland (3d Ed. 1943), par. 1930.[18]

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[17] Changes in other portions of Section 10 (c) included an amendment dealing with the issuance of back-pay orders in cases involving union unfair labor practices.

[18] The Supreme Court has held that an administrative interpretation, upon reenactment, has the force and effect of law. *Robertson* v. *Downing*, 127 U. S. 607; *United States* v. *Healey*, 160 U. S. 136; *United States* v. *Falk*, 204 U. S. 143, 152; *United States* v. *Cerecedo Hermanos y Compania*, 209 U. S. 337; *National Lead Co.* v. *U. S.*, 252 U. S. 140, 147; *Brewster* v. *Gage*, 280 U. S. 327, 337; *McCaughn* v. *Hershey Chocolate*, 283 U. S. 488, 492; *Hartley* v. *Commissioner*, 295 U. S. 216, 220; *Helvering* v. *Reynolds*, 306 U. S. 110, 115.

It is respectfully submitted, therefore, that Congress' reenactment of Section 10 (c) without change (except for the enlargement noted above, n. 17) in the Board's authority to issue back pay orders, put its stamp of approval on the Board's past interpretation of that Section.

WHEREFORE, it is prayed that a rehearing be granted and that, upon reconsideration, the Court vacate and set aside its opinion of January 30, 1950, insofar as it holds that unemployment compensation benefits are deductible in computing the back pay awarded under the Board's order, and that the Court grant enforcement of the Board's order without the qualification directed in the last paragraph of the opinion.

Respectfully submitted,

DAVID P. FINDLING,
Associate General Counsel,
A. NORMAN SOMERS,
Assistant General Counsel,
OWSLEY VOSE,
GEORGE H. PLAUTT,
Attorneys,
National Labor Relations Board.

FEBRUARY 1950.

CERTIFICATE OF COUNSEL

Comes now A. Norman Somers, Assistant General Counsel of the National Labor Relations Board, and certifies that he has read and knows the contents of the foregoing petition and that said petition is filed in good faith and not for purposes of delay.

A. NORMAN SOMERS,
National Labor Relations Board.

Dated this 28th day of February 1950.

APPENDIX

The pertinent portions of the Louisiana Unemployment Compensation Law (Dart, Louisiana General Statutes, § 4434.1 *et. seq.*) are as follows:

4434.1. *Declaration of state public policy.*—As a guide to the interpretation and application of this act, the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals and welfare of the people of this state. Unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its

spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. This legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state require the enactment of this measure, for the compulsory setting aside of unemployment reserves to be used for the benefit of unemployed persons. [Acts 1936, No. 97, § 1; 1938, No. 164, § 2.]

4434.2. *Payment of benefits.*—(a) Payment of Benefits. All benefits provided herein shall be payable from the fund. All benefits shall be paid through employment offices, in accordance with such regulations as the administrator may prescribe.

(b) Weekly Benefit Amount.

(1) Weekly Benefit Amount. An individual's weekly benefit amount shall be an amount equal to 1/20 of his total wages for insured work paid during that quarter of his base period in which such total wages were highest, except that if such amount is more than $25.00, the weekly benefit amount shall be deemed to be $25.00, or if less than $5.00 shall be deemed to be $5.00, and if not a multiple of $1.00 shall be computed to the next higher multiple of $1.00.

(2) Weekly Benefit. Each eligible individual who is employed [unemployed] in any week shall be paid with respect to such week a benefit in an amount equal to his weekly benefit amount less than part of the wages (if any) payable to him with respect to such week which is in excess of $3.00. Such benefit, if not a multiple of $1.00, shall be computed to the next higher multiple of $1.00.

• • • • •

(d) Duration of Benefits. Any otherwise eligible individual shall be entitled during any benefit year to a total amount of benefits equal to whichever is the lesser of (1) twenty times his weekly benefit amount, and (2) one-third of his wages for insured work paid during the base period; provided that such total amount of benefits, if not a multiple of $1.00, shall be computed to the next higher multiple of $1.00. For the purposes of this section, wages shall be counted as "wages for insured work" for benefit the [*sic*] purposes with respect to

any benefit year only if such benefit year begins subsequently to the date on which the employing unit by whom such wages were paid has satisfied the condition of section 18 (f) [§ 4434.18] or section 7 (e) [§ 4434.7] with respect to becoming an employer.

* * * * *

4434.3. *Benefit eligibility conditions.*—An unemployed individual shall be eligible to receive benefits with respect to any week only if the administrator finds that:

(e) He has during his base period been paid wages for insured work equal to not less than thirty times his weekly benefit amount. For the purposes of this subjection, wages shall be counted as "wages for insured work" for benefit purposes with respect to any benefit year only if such benefit year begins subsequent to the date on which the employing unit by which such wages were paid has satisfied the conditions of section 18 (f) [§ 4434.18] or section 7 (e) [§ 4434.7] with respect to becoming an employer. [Acts 1936, No. 97, § 3; 1938, No. 164, § 2; 1940, No. 11, § 3; 1944, No. 160, § 1.]

Order Denying Rehearing

Extract from the Minutes of March 18, 1950.

No. 12798

GULLETT GIN COMPANY, INC.

versus

NATIONAL LABOR RELATIONS BOARD

It is ordered by the Court that the Petition for rehearing filed in this cause be, and the same is hereby, denied.

Clerk's Certificate

United States of America, United States Court of Appeals, Fifth Circuit

I, Oakley F. Dodd, Clerk of the United States Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 111 to 149, next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and pro-

ceedings, including the opinion of the United States Court of Appeals, for the Fifth Circuit, in a certain cause in said Court, numbered 12798, wherein GULLETT GIN COMPANY, INC., is Petitioner and NATIONAL LABOR RELATIONS BOARD, is Respondent, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 110, are identical with the printed record upon which said cause was heard and decided in the said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 9th day of May, A. D. 1950.

OAKLEY F. DODD,
Clerk of the United States Court of Appeals, Fifth Circuit.

[SEAL.]

U. S. GOVERNMENT PRINTING OFFICE 1950 867743 717

134 In the United States Court of Appeals for the Fifth Circuit

No. 12798

GULLETT GIN COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Decree enforcing as modified an order of the National Labor Relations Board

Before HUTCHESON, Chief Judge, and HOLMES and MCCORD, Circuit Judges.

This cause came on to be heard upon the petition for review filed by the Gullett Gin Company, Inc., and upon the cross-petition of the National Labor Relations Board to enforce its Order dated April 21, 1949. The Court, on January 11, 1950, heard arguments of respective counsel, and has considered the briefs and the transcript of record filed herein. On January 30, 1950, the Court, being fully advised in the premises, handed down its decision enforcing, as modified, said order of the Board. In conformity therewith, it is hereby

Ordered, adjudged, and decreed that the petitioner, Gullett Gin Company, Inc., Amite, Louisiana, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) In any manner interfering with, restraining, or coercing its employees in the exercise of their right to engage in concerted activities for their mutual aid or protection.

2. Take the following affirmative action which the Board has found will effectuate the policies of the National Labor Relations Act:

(a) Offer to Ellis W. Pechon, Van Buren Bennett, Corydon L. Pechon, J. W. Bankston, Leander Hayden, Elmer Hayden,
135 Jesse J. Hayden, Carl E. Warren, Irving Branch, and Jesse Cutrer immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges, and make each of them whole for any loss of pay he may have suffered by reason of the Petitioner's discrimination against him by payment to him a sum of money equal to that which he normally would have earned as wages from May 13, 1948, the date of the Petitioner's discrimination against him, to the date of the offer of reinstatement, less his net earnings or benefits received under the Louisiana Unemploy-

ment Compensation Law; and less willful losses, if any, incurred by him during such period;

Post at its plant in Amite, Louisiana, copies of the notice attached hereto and marked Appendix A. Copies of said notice to be furnished by the Regional Director for the Fifteenth Region of the National Labor Relations Board, New Orleans, Louisiana, after being duly signed by representatives of the Petitioner shall be posted by Petitioner immediately upon receipt thereof and maintained by it for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees customarily are posted. Reasonable steps shall be taken by Petitioner to insure that said notices are not altered, defaced, or covered by other material; and

(c) Notify the Regional Director for the Fifteenth Region of the National Labor Relations Board, New Orleans, Louisiana, in writing within ten (10) days from the receipt of this Decree what steps Petitioner has taken to comply herewith.

(Signed) J. C. HUTCHESON, Jr.,
Chief Judge, United States Court of Appeals for the Fifth Circuit.

(Signed) E. R. HOLMES,
Judge, United States Court of Appeals for the Fifth Circuit.

(Signed) LEON MCCORD,
Judge, United States Court of Appeals for the Fifth Circuit.

Dated: June 5, 1950.

APPENDIX A

NOTICE TO ALL EMPLOYEES

Pursuant to a decree of the United States Court of Appeals for the Fifth Circuit enforcing, as modified, a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We will not in any manner interfere with, restrain, or coerce our employees in the exercise of their right to engage in concerted activities for their mutual aid or protection.

We will offer to the employees named below immediate and full reinstatement to their former or substantially equivalent positions without prejudice to any seniority or other rights and privi-

leges previously enjoyed, and make them whole for any loss of pay suffered as a result of the discrimination.

Ellis W. Pechon	Elmer Hayden
Van Buren Bennett	Jesse J. Hayden
Corydon L. Pechon	Carl E. Warren
J. W. Bankston	Irving Branch
Leander Hayden	Jesse Cutrer

GULLETT GIN COMPANY, INC.,
Employer.

Dated ---------- By ----------
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[Clerk's certificate to foregoing paper omitted in printing.]

Order allowing certiorari

Filed October 9, 1950

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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CLERK

No. 122

In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1950

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GULLETT GIN COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. —

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GULLETT GIN COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit entered on January 30, 1950 (R. 114–118), modifying an order issued by the Board against the Gullet Gin Company, Inc., (R. 53–60).

OPINIONS BELOW

The opinion of the Court of Appeals (R. 114–118) is reported in 179 F. 2d 499. The Board's petition for rehearing was denied without opinion on March 18, 1950. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 53–107) are reported at 83 NLRB No. 1.

JURISDICTION

The decision of the Court of Appeals was entered on January 30, 1950. The petition for rehearing was denied on March 18, 1950. The jurisdiction of this Court is invoked under Section 1254 of 28 U. S. C., as codified June 25, 1940, and Section 10 (e) and (f) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether the Board is required to permit an employer to deduct from the back pay due discriminatorily discharged employees under an order of the Board sums which the employees may have received from the State as unemployment compensation benefits.

STATUTES INVOLVED

The statutory provisions principally involved are the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. II, Secs. 141, *et seq.*), Section 10 (c); Louisiana Unemployment Compensation Law (Dart's La. Gen. Stat. 1949, Secs. 4434.1 *et seq.*). The pertinent provisions are set out in the Appendix.

STATEMENT

Following the usual proceedings under Section 10 (c) of the Act, the Trial Examiner, on January 14, 1949, issued his intermediate report (R. 60–107), finding that the Company had discharged certain employees in violation of Section

8 (a) (1) and (3) of the Act, and recommending that the Company be required to reinstate these employees with back pay. The Company excepted to the intermediate report (R. 51–53) on the ground, *inter alia,* that the Trial Examiner "failed to recommend that there be deducted from the back pay award for each employee such sums of money as have been received by each employee from the Louisiana Unemployment Compensation Fund." On April 21, 1949, the Board issued its Decision and Order adopting the Trial Examiner's findings and recommendations with modifications not pertinent here (R. 55), and rejecting the Company's contention that unemployment insurance benefits should be deducted from the back pay awards. The Board's order relating to reinstatement and back pay, in the usual form,[1] directed the Com-

[1] The order required the Company to

(a) Offer to [named employees] immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges, and make each of them whole for any loss of pay he may have suffered by reason of the Respondent's discrimination against him by payment to him a sum of money equal to that which he normally would have earned as wages from May 13, 1948, the date of the Respondent's discrimination against him, to the date of the offer of reinstatement, less his net earnings [7] and less willful losses, if any, incurred by him during such period;

[7] By "net earnings" is meant earnings less expenses, such as for transportation, room, and board, incurred by an employee in connection with obtaining work and working elsewhere, which would not have been incurred but for his unlawful discrimination and the

pany to make the employees whole for their wage losses by paying them what they would have earned had they remained in the Company's employ, less such sums as they actually earned in the interim or failed without excuse to earn.

The Company filed with the court below a petition to review the Board's decision and order (R. 1), contending *inter alia*, that the Board's order, to the extent that it precluded deduction of unemployment insurance benefits, was punitive in character. The Board answered and requested enforcement of its order (R. 15). On January 30, 1950, the court below issued its decision sustaining the Board's finding that the employees were discharged in violation of Section 8 (a) (1) of the Act.[2] The court enforced the reinstatement provision of the Board's order, but modified the back pay provision by permitting the Company to deduct from the back pay due such amounts of money as the employees may have received from

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consequent necessity for his seeking employment elsewhere. *Matter of Crosset Lumber Company*, 8 NLRB 440. Monies received for work performed upon Federal, State, county, municipal, or other work-relief projects shall be considered as earnings. *Republic Steel Corporation* v. *National Labor Relations Board*, 311 U. S. 7.

[2] The court reversed the Board's finding that by the discharge the Company also violated Section 8 (a) (3) of the Act and struck from the order a provision requiring the Company to cease and desist from violating this subsection. The Board does not seek review of the judgment below in this respect.

the Louisiana Workmen's Compensation Fund.[3] In explanation of this modification of the order, the court stated, "On the authority of *Republic Steel Corp.* v. *National Labor Relations Board*, 311 U. S. 7, 61 S. Ct. 77, 85 L. ed. 6, we agree with respondent." The Board filed a petition for rehearing (R. 119–132) on the question of the deductibility of the unemployment compensation benefits, which the court denied without opinion on March 18, 1950 (R. 132).

SPECIFICATION OF ERRORS TO BE URGED

The Court below erred:

1. In holding that the Board is required to permit deduction of unemployment compensation benefits from back pay.

2. In relying upon the decision in *Republic Steel Corp.* v. *National Labor Relations Board, supra,* as authority for the holding that unemployment insurance benefits may be deducted from back pay awards.

3. In failing to enforce in full the back pay order of the Board.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below conflicts with the decision of the Court of Appeals for the Seventh Circuit in *National Labor Relations*

[3] The court below in its opinion inadvertently described the State agency as "Louisiana Workmen's Compensation" instead of Louisiana Unemployment Compensation.

Board v. *Marshall Field & Co.*, 129 F. 2d 169, affirmed on other grounds, 318 U. S. 253. In the *Marshall Field* case, the Court of Appeals held that a back pay order which precluded the employer from deducting unemployment insurance benefits received by the discharged employees from the Illinois Unemployment Compensation Fund "was within the powers of the Board" (129 F. 2d, at 173). The court below stated (179 F. 2d, at 502): "We do not agree with the view of the majority in *National Labor Relations Board* v. *Marshall Field & Co.*, 7 Cir., 129 F. 2d 169, that such a holding and order was a lawful and proper one for the Board to make."

In the *Marshall Field* case the court rejected each of the contentions which were advanced by the Company in this case and which apparently were adopted by the court below. The court there held (129 F. 2d, at p. 172), that the mere fact that nondeduction of unemployment compensation benefits might result in some cases in receipt by employees of more money for their period of unemployment than they would have received had they not been discharged did not make the Board's order "punitive." The court said (*ibid.*):

> In private contract or tort cases involving loss of employment * * * the amount of damages recoverable is not affected by collateral benefits paid to the injured person. Yet in these cases, the

> award is not of punitive damages, but of compensatory damages, the purpose of which is to make the injured party whole. The wrongdoer may not be benefited by collateral payments made to the person he has wronged.

The court also held (129 F. 2d, at pp. 172–173), that the fact that the employer is taxed to maintain the unemployment compensation fund out of which benefits are paid does not make the benefits direct rather than collateral. "The benefits in question were paid by the State, not by respondent. How the State raised the funds is a matter between the State and its taxpayers. If the payment of the benefits increases respondent's tax rate, the increase is caused not by the order of the Board, but by the law of the State" (*ibid.*). The court concluded (*ibid.*) that the employer does not have "such an interest in the payments that they should be credited to its account." Cf. *Matter of Cassaretakis,* 289 N. Y. 119, 44 N. E. 2d 391, 394–395, affirmed *sub nom. Standard Dredging Co.* v. *Murphy,* 319 U. S. 306.

2. The decision of this Court in *Republic Steel Corp.* v. *National Labor Relations Board,* 311 U. S. 7, which preceded the decision of the Seventh Circuit in the *Marshall Field* case, does not support the judgment of the court below. In that case no question of deductibility of earnings or of collateral benefits from back pay was pre-

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sented. The Board had ordered the employer to deduct from the back pay due sums earned by the employees on work relief projects and to pay such sums to the work relief agencies. The Court held that the order requiring such payments by the employer to public work relief agencies was not designed to make employees whole for losses sustained by them as a result of the unlawful discharges, and therefore exceeded the Board's powers under the Act.

The Board's order in the instant case, on the other hand, does not undertake to deal with the disposition of funds deducted from or included in back pay. The order reflects the Board's conviction that to permit the employer to deduct unemployment compensation benefits, which are "plainly not 'earnings'" (*Marshall Field & Co.* v. *National Labor Relations Board*, 318 U. S. 253), from the back pay due would defeat the policy of Congress in authorizing the back pay remedy.

3. The holding of the court below that employers may deduct unemployment compensation benefits from back pay due discriminatorily discharged employees upsets a consistent Board practice of long standing. The Board, early in its history, adopted the view that the function of the "back pay" award authorized by Section 10 (c) of the Act, was to compensate employees for loss of earnings resulting from the discharge.[4]

[4] *Clinton Cotton Mills*, 1 NLRB 97, 121 ("losses of pay"); *Carlisle Lumber Company*, 2 NLRB 248, 278 ("loss of

Consonant with this view, the Board in computing back pay, disregarded both collateral losses and collateral benefits resulting from the discharge, and measured the sum due by the amount the employee would have earned absent the discharge, less such sums as the employee earned, or failed without excuse to earn[5] during the back pay period.

The legislative history of the Wagner Act supports the Board's view that collateral benefits and collateral losses are to be disregarded in computin back pay. Although early versions of the bill which became the Wagner Act authorized the Board to measure awards to discharged em-employees by such broad standards as "substantial justice" and "restitution,"[6] the Act, as adopted,

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wages"); National Labor Relations Board, First Annual Report (1936), p. 129; *Id.*, Second Annual Report (1937), p. 152.

[5] The latter qualification resulted from this Court's decision in *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 198–200. The Board's practice of limiting deductions to "net earnings" during the back pay period was discussed in the *Phelps Dodge* case, 313 U. S., at p. 198, n. 7.

[6] S. 2926, Original Senate Print, 73rd Cong., 2nd Sess., Sec. 205 (c); S. 1958, Original Senate Print, 74th Cong., 1st Sess., Sec. 10 (d); S. 1958, as reported 2nd Senate Print, 74th Cong., 1st Sess., Sec. 10 (c). These bills are reprinted in Legislative History of the National Labor Relations Act, 1935 (G. P. O., 1949), pp. 7, 1302, 2292 respectively. See Senate Memorandum Comparing S. 2926 with S. 1958, 74th Cong., 1st Sess., pp. 4, 34, reprinted in Legislative History of the National Labor Relations Act, 1935, *supra*, at pp. 1324, 1360.

provided for the award merely of "back pay." The legislative history shows that Congress intended thereby to authorize the Board to award an employee unlawfully discharged *"compensation for the time that he has lost through unlawful discharge."* [Emphasis added.][7]

The award of "back pay" thus authorized by Congress under the Act is analogous to the award of damages for wrongful discharge at common law. Under the common law rule damages are awarded to compensate for "loss of earnings," and these are measured by the amount the employee would have earned, absent the discharge, less such sums as the employee earned, or failed without excuse to earn during the period involved.[8] Further, under this test, the employees' collateral losses and benefits incident to the discharge are disregarded in computing loss of earnings.[9] The Court of Appeals for the Eight Circuit in *National Labor Relations Board* v.

[7] Memorandum Comparing S. 2926 with S. 1958, dated March 11, 1935, Senate Committee Print, 74th Cong., 1st Sess., p. 4, reprinted in Legislative History of the National Labor Relations Act, 1935 (Gov't Print. Off., 1949), p. 1324.

[8] Williston on *Contracts* (Rev. Ed. 1937), Sec. 1358; *Restatement of the Law of Torts*, Sec. 924, Comment C.

[9] *Bang* v. *International Sisal Co.*, 212 Minn. 135, 4 N. W. 2d 113, 116; *McCarthy* v. *Palmer*, 29 F. Supp. 585, 588–589 (E. D., N. Y.), affirmed, 115 F. 2d 721, 723 (C. A. 2), certiorari denied, 311 U. S. 680; *Cunnien* v. *Superior Iron Works Co.*, 175 Wis. 172, 187–188, 184 N. W. 767, 770–772; *Bangor & Aroostook R. Co.* v. *Jones*, 36 F. 2d 886, 890–891 (C. A. 1); *Hayes* v. *Morris & Co.*, 98 Conn. 603, 607–608, 119 A. 901; *Overland Construction Co.* v. *Sydnor*, 70 F. 2d 338, 340 (C. A. 6).

Brashear Freight Lines, 127 F. 2d 198, 199, like the Court of Appeals for the Seventh Circuit in the *Marshall Field* case, *supra,* pp. 6–7, pointed to this analogy in upholding the Board's practice of excluding collateral benefits and losses from consideration in computing back pay. In the *Brashear* case, where the employer claimed the right to deduct from back pay the value of groceries received by the discharged employee from his union, the court said:—

> * * * our order could not, we think, be interpreted as intending to give the employer, found to be a wrongdoer, the benefit of gifts or other collateral benefits received by the former employee during his period of unemployment. * * * The general rule that a tortfeasor is not entitled to reduction of damages because the injured one has had the benefit of insurance payments or other collateral benefits would seem to be analogous.

At the time Congress enacted the amended Act it was familiar with the Board's practice of excluding collateral losses which would increase the sum due, and collateral benefits, including unemployment compensation, which would reduce it, from consideration in computing back pay awards.[10] That practice had been approved by the only two Circuit Courts of Appeals which had

[10] See *e. g.*, National Labor Relations Board, Fourth Annual Report (1940), p. 100, n. 25; *id.*, Tenth Annual Report (1946), p. 52; *id.*, Eleventh Annual Report (1947), p. 50.

considered the matter. *Marshall Field* and *Brashear Freight* cases, *supra*. Although Congress amended Section 10 (c) in certain other respects,[11] it reenacted the "back pay" provision without change, thereby indicating its approval of the practice. *Helvering* v. *Reynolds Co.*, 306 U. S. 110, 114–115; *Brewster* v. *Gage*, 280 U. S. 327, 337; *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 313–315.

4. In the *Marshall Field* case, at a time when there was no conflict between the circuits, this Court granted certiorari, on petition of the Company, to review the question here presented, 317 U. S. 617. Decision was reserved, however, since, on review of the record, the Court found that the question had not properly been raised before the Board. 318 U. S. 253, 255–256.

The importance of the question in the administration of the Act has not been diminished by the amendments. Under the Wagner Act over 40,000 workers received upwards of 12 million dollars in back pay awards.[12] Under the Act, as amended, the awards may be even greater, since additional unfair labor practices are defined and unions as well as employers may be liable for back pay.

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[11] Particularly by including a provision authorizing the issuance of back pay orders against labor organizations in appropriate cases.

[12] Twelfth Annual Report of the National Labor Relations Board (1948), Table 7, p. 88. Cf. *Social Security Board* v. *Nierotko*, 327 U. S. 358, 360, n. 4.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for certiorari should be granted.

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ROBERT N. DENHAM,
General Counsel,
National Labor Relations Board.

JUNE 1950.

APPENDIX

The pertinent provisions of the National Labor Relations Act as amended by the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. II, Secs. 141, *et seq.*) are as follows:

> SEC. 10 (c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: * * *.
>
> * * * * * *

The pertinent portions of the Louisiana Unemployment Compensation Law (Dart's La. Gen. Stat., 1949, § 4434.1 et seq.) are as follows:

4434.1. *Declaration of state public policy.*—As a guide to the interpretation and application of this act, the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals and welfare of the people of this state. Unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state require the enactment of this measure, for the compulsory setting aside of unemployment reserves to be used for the benefit of unemployed persons. [Acts 1936, No. 97, § 1; 1938, No. 164, § 2.]

4434.2. *Payment of benefits.*—(a) Payment of Benefits. All benefits provided herein shall be payable from the fund. All benefits shall be paid through employment offices, in accordance with such regulations as the administrator may prescribe.

(b) Weekly Benefit Amount.

(1) Weekly Benefit Amount. An individual's weekly benefit amount shall be an amount equal to $\frac{1}{20}$ of his total wages for

insured work paid during that quarter of his base period in which such total wages were highest, except that if such amount is more than $25.00, the weekly benefit amount shall be deemed to be $25.00, or if less than $5.00 shall be deemed to be $5.00, and if not a multiple of $1.00, shall be computed to the next higher multiple of $1.00.

(2) Weekly Benefit. Each eligible individual who is employed [unemployed] in any week shall be paid with respect to such week a benefit in an amount equal to his weekly benefit amount less than part of the wages (if any) payable to him with respect to such week which is in excess of $3.00. Such benefit, if not a multiple of $1.00, shall be computed to the next higher multiple of $1.00.

* * * * *

(d) Duration of Benefits. Any otherwise eligible individual shall be entitled during any benefit year to a total amount of benefits equal to whichever is the lesser of (1) twenty times his weekly benefit amount, and (2) one-third of his wages for insured work paid during the base period; provided that such total amount of benefits, if not a multiple of $1.00, shall be computed to the next higher multiple of $1.00. For the purposes of this section, wages shall be counted as "wages for insured work" for benefit the [sic] purposes with respect to any benefit year only if such benefit year begins subsequent to the date on which the employing unit by whom such wages were paid has satisfied the condition of section 18 (f) [§ 4434.18] or section 7 (c) [§ 4434.7] with respect to becoming an employer.

* * * * *

4434.3. *Benefit eligibility conditions.*—An unemployed individual shall be eligible to receive benefits with respect to any week only if the administrator finds that:

* * * * *

(e) He has during his base period been paid wages for insured work equal to not less than thirty times his weekly benefit amount. For the purposes of this subsection, wages shall be counted as "wages for insured work" for benefit purposes with respect to any benefit year only if such benefit year begins subsequent to the date on which the employing unit by which such wages were paid has satisfied the conditions of section 18 (f) [§ 4434.18] or section 7 (c) [§ 4434.7] with respect to becoming an employer. [Acts 1936, No. 97, § 3; 1938, No. 164, § 2; 1940, No. 11, § 3; 1944, No. 160, § 1.]

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No. 122

In the Supreme Court of the United States

OCTOBER TERM, 1950

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GULBERT GEE COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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Williston on *Contracts* (Rev. Ed., 1937), Secs. 1358, 1751	17, 18, 38

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 122

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GULLETT GIN COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINION BELOW

The opinion of the court below (R. ~~114-118~~ 72-76) is reported at 179 F. 2d 499. The Board's petition for rehearing was denied without opinion on March 18, 1950 (R. ~~132~~ 78). The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. ~~53-107~~ 32-62) are reported at 83 NLRB 1.

JURISDICTION

The decision of the Court of Appeals was issued on January 30, 1950, and the decree was entered on June 5, 1950. The petition for rehearing was

denied on March 18, 1950. The petition for a writ of certiorari was filed June 8, 1950, and granted on October 9, 1950. The jurisdiction of this Court rests on Section 10 (e) of the National Labor Relations Act, as amended, and 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether an employer who has discriminatorily discharged an employee in violation of Section 8 (a) (1) of the National Labor Relations Act, as amended, must be allowed to deduct from his back pay obligation, under an order of the Board, sums paid to the employee by the State as unemployment compensation.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. III, 141, *et seq.*), the Federal Employment Tax Act (53 Stat. 1387, 1388, 26 U. S. C. 1600–1601), and the Louisiana Unemployment Compensation Law (Dart's La. Gen. Stat. 1949, Secs. 4434.1, *et seq.*) are set out in the Appendix, *infra*, pp. 62–74.

STATEMENT

Following the usual proceedings under Section 10 (c) of the National Labor Relations Act, the

Trial Examiner, on January 14, 1949, issued his intermediate report (R. 60–107), finding that the Company (respondent herein) had discharged certain employees in violation of Section 8 (a) (1) and (3) of the Act, and recommending that the Company be required to reinstate these employees with back pay. The Company excepted to the intermediate report (R. 51–53) on the ground, *inter alia*, that the Trial Examiner "failed to recommend that there be deducted from the back pay award for each employee such sums of money as have been received by each employee from the Louisiana Unemployment Compensation Fund." On April 21, 1949, the Board issued its Decision and Order (R. 53–58) adopting the Trial Examiner's findings and recommendations with modifications not pertinent here (R. 56), and rejecting the Company's contention that unemployment insurance benefits should be deducted from the back pay awards. Finding that such action "will effectuate the policies of the Act" the Board, in the form usual for such order, directed the Company, *inter alia*, to make the employees whole for their wage losses by paying them what they would have earned had they remained in the Company's employ, less such sums as they

actually earned in the interim or failed without excuse to earn (R. 57).[1]

The Company filed with the court below a petition to review the Board's decision and order (R. 1), contending *inter alia*, that the Board's order, to the extent that it precluded deduction of unemployment insurance benefits from the back pay obligation, was punitive in character. The Board answered and requested enforcement of its order (R. 15). On January 30, 1950, the court

[1] The order required the Company to—

"(a) Offer to [named employees] immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges, and make each of them whole for any loss of pay he may have suffered by reason of the Respondent's discrimination against him by payment to him a sum of money equal to that which he normally would have earned as wages from May 13, 1948, the date of the Respondent's discrimination against him, to the date of the offer of reinstatement, less his net earnings [2] and less willful losses, if any, incurred by him during such period.

[2] "By 'net' earnings' is meant earnings less expenses, such as for transportation, room, and board, incurred by an employee in connection with obtaining work and working elsewhere, which would not have been incurred but for his unlawful discrimination and the consequent necessity for his seeking employment elsewhere. *Matter of Crossett Lumber Company*, 8 NLRB 440. Monies received for work performed upon Federal, State, county, municipal, or other work-relief projects shall be considered as earnings. *Republic Steel Corporation* v. *National Labor Relations Board*, 311 U. S. 7."

below issued its decision sustaining the Board's finding that the employees were discharged in violation of Section 8 (a) (1) of the Act.[2] The court enforced the reinstatement provision of the Board's order, but modified the back pay provision by permitting the Company to reduce its back pay obligation by deducting such amounts of money as the employees may have received from the Louisiana Unemployment Compensation Fund.[3] In explanation of this modification of the order, the court stated (R. 117), "On the authority of *Republic Steel Corp.* v. *National Labor Relations Board*, 311 U. S. 7, 61 S. Ct. 77, 85 L. Ed. 6, we agree with respondent." The Board filed a petition for rehearing (R. 119–132) on the question of the deductibility of the unemployment compensation benefits, which the court denied without opinion on March 18, 1950 (R. 132).

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[2] The court reversed the Board's finding that by the discharge the Company also violated Section 8 (a) (3) of the Act and struck from the order a provision requiring the Company to cease and desist from violating this subsection. The Board does not seek review of the judgment below in this respect.

[3] The court below in its opinion inadvertently described the State agency as "Louisiana Workmen's Compensation" instead of Louisiana Unemployment Compensation. The decree reads correctly.

SPECIFICATION OF ERRORS TO BE URGED

The Court below erred:

1. In holding that the Board is required to permit deduction of unemployment compensation benefits from back pay.

2. In relying upon the decision in *Republic Steel Corp.* v. *National Labor Relations Board, supra,* as authority for the holding that unemployment compensation benefits must be deducted from back pay awards.

3. In failing to enforce in full the back pay order of the Board.

SUMMARY OF ARGUMENT

The Board's order in this case directing the award of back pay to wrongfully discharged employees provided, according to the Board's usual form, that the employer's obligation should be reduced by any earnings which the employee received and amounts which he wilfully refused to earn, but refused to allow a like deduction for collateral benefits such as benefits from the state unemployment compensation fund. The question is whether the Board's determination that that practice "will effectuate the policies of the Act" was a determination which it was competent for the Board, in the exercise of its informed discretion, to make.

I

A. In framing its remedial awards, the Board is vested with broad discretion. This Court has said that its order "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric and Power Co.* v. *National Labor Relations Board,* 319 U. S. 533, 540. The practice which the Board has here followed is essentially that which prevailed at common law in actions for damages for wrongful discharge. In such actions the common-law courts permitted recovery only of the earnings lost, and disregarded other collateral—and often very serious—losses to the employee resulting from the discharge, such as distress sales, forced borrowing, evictions, mortgage foreclosures, forfeiture of rights under installment contracts and insurance policies, and impairment of physical and mental health. As a corollary, the common-law courts likewise disregarded benefits received by the employee, other than alternative earnings or amounts which the employee wilfully refused to earn. A like rule appears to have been applied by various administrative agencies prior to the adoption of the Wagner Act.

B. Congress contemplated that it would be appropriate for the Board to apply this rule. Some

of the preliminary versions of the bill which became the National Labor Relations Act would have authorized the Board to measure awards to unlawfully discharged employees by such broad standards as "substantial justice," or "restitution." Had these standards been adopted it might have been argued that the Act required a departure from the common-law test so as to award recovery for collateral losses suffered by the employee. In that event, it might have been appropriate also to consider benefits other than earnings. The bill as passed, however, adopted the formula of authorizing awards of "back pay," a phrase which is clearly suggestive of the "loss of earnings" test. Thus while Congress did not seek to limit the Board's discretion in framing its remedial orders, it clearly did contemplate that it would be appropriate for the Board to apply the common law test.

C. In any event, adoption of that test by the Board was an appropriate exercise of the Board's discretion. While the Board is not limited to the application of common-law rules, it certainly is not precluded from applying them where they seem appropriate. The back pay which Congress authorized the Board to award serves many of the same functions as an award of compensatory damages to one discharged in breach of a contract of employment. Moreover, the common-law rule has the advantages of familiarity and relative sim-

plicity of application. Prior to the decision below, the only two courts of appeals that had passed on the question had approved the Board's practice in this respect.

D. The Board's practice was presumably known to Congress, having been referred to in numerous reports of the Board. In the course of enactment of the Taft-Hartley Act in 1947, Congress exhaustively reexamined the provisions of the Wagner Act, and the Board's practice under them. Hence the fact that it reenacted the back-pay provisions without any change material to the present issue is a strong indication of its approval of the Board's practice in this regard.

II

A. The Company's argument that unemployment insurance benefits are direct rather than collateral is without foundation in law or fact. Courts applying the common law "loss of earnings" test have uniformly held that unemployment compensation benefits and railroad retirement annuities to which the employer has contributed are collateral and not direct. In *National Labor Relations Board* v. *Marshall Field & Co.*, 129 F. 2d 169 (C. A. 7), affirmed on other grounds, 318 U. S. 253, the Court of Appeals for the Seventh Circuit so held as to unemployment compensation benefits.

Benefits are deemed direct only when procured by the employer or where they have been paid

or received to satisfy his liability. This Court has held that an employer's unemployment insurance payments are taxes. Plainly, employers do not, by paying their taxes, purchase immunity from responsibility for the injuries resulting from their illegal conduct. Unemployment compensation laws were designed to minimize hardships growing out of economic unemployment; they were not created to protect employers against the consequences of wrongful discharges. Moreover, the employers' payments are not segregated, but are placed in a pooled fund out of which all benefits are paid.

The fact, if it were shown, that the Company's rate of contribution may be affected by the amount of benefits the discharged employees receive would not establish that the benefits are direct rather than collateral. The benefits are paid by the State, not by the Company. The tax rate was designed to vary with the amount of unemployment chargeable to each employer, not through some notion that employers were financially liable to all employees whom they dismiss, but because this device would tend to stabilize employment by discouraging layoffs and discharges.

In any event, there has been no showing in this case that the employer's rate of contribution has been affected by the discharges. In view of the complex factors which enter into a deter-

mination whether particular discharges affect an employer's tax rate, it is impossible to argue even hypothetically, as the Company seeks to do, that the discharges will affect its rate. Moreover, even if the Company had in fact been assessed a higher rate as a result of charges to its rating account, it might, under the Louisiana law and under this Court's decision in *Social Security Board* v. *Nierotko*, 327 U. S. 358, be able to expunge such charges from its record.

B. The Company's argument that the Board's policy results in an award which makes the employee more than whole rests upon the fallacious premise that in computing the employee's net loss attributable to the discharge, collateral benefits but not collateral losses must be considered. Unless employees are made whole for their collateral losses, it is unfair even to suggest that failure to deduct collateral benefits, such as unemployment insurance, will result in a windfall to the employees. Moreover, the Company overlooks the very real possibility that the state may recoup from the employees any benefits paid them during the period of discharge upon receipt by the employees of back pay for the period involved.

Finally, receipt of unemployment compensation itself results in additional losses to the employee which offset even further the hypothetical "windfall" of which the Company complains. Under

the Louisiana law each time a worker, discriminatorily discharged, is required to draw upon his unemployment compensation, he reduces the reserves otherwise available for a subsequent period of non-discriminatory unemployment. In addition, if the employer is permitted to deduct benefits from back pay, the employee's standing under the Federal Old Age and Survivors Insurance program would be prejudiced.

C. The Board's order is not punitive. The argument that non-deduction of unemployment benefits makes the Board's order punitive was correctly rejected by the Seventh Circuit in the *Marshall Field* case, *supra*. In common-law tort and contract cases, the amount of damages recoverable is not affected by collateral benefits paid to injured parties. Yet in those cases the award is deemed compensatory, not punitive. The same is true in cases involving statutes which prescribe as compensation to an employee for wrongful discharge or minimum wage violations an amount arbitrary in character and larger than the wages which would have been earned for the period covered. Nothing in this Court's decision in *Republic Steel Corp.* v. *National Labor Relations Board*, 311 U. S. 7, supports a contrary view. Indeed, that case approved the loss of earnings test. Its holding that the Board could not direct the employer to make payments to other governmental agencies to effectuate the policies of those

agencies has no relevance to the issues here presented.

ARGUMENT

INTRODUCTION

The narrow question presented by this case is whether, in awarding back pay to employees who have been wrongfully discharged, the Board could properly refuse to provide for the deduction of unemployment compensation benefits paid pursuant to state law. That question was presented to this Court in *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U. S. 253, but it was not decided in that case because the company's objection had not been properly presented to the Board. There is no doubt that the question is properly presented here.

We think it clear that the refusal to permit deduction of such unemployment compensation benefits was within the Board's power. In selecting remedial provisions which, in its opinion, will effectuate the policies of the Act, the Board is entrusted with a broad discretion. In exercising that discretion, it has adopted the so-called "loss of earnings" rule under which the measure of the employee's recovery is the earnings which he has lost, less any alternative earnings which he obtained or wilfully refused to obtain. Under that rule, collateral losses to the employee such as those flowing from eviction, distress sales, forced

borrowing, forfeiture of rights under installment contracts, mortgage foreclosures, and loss of mental and physical health resulting from the loss of earnings—are ignored, and, by the same token, collateral benefits to the employee, such as insurance receipts, gifts, workmen's compensation benefits, union relief payments, and unemployment compensation benefits are equally disregarded. As this Court has held, unemployment compensation benefits are "plainly not 'earnings'" (*Marshall Field & Co.* v. *National Labor Relations Board,* 318 U. S. 253, 255), and may not therefore, compatibly with the "loss of earnings" rule, be deducted from the back pay obligation.

In the first part of this brief we shall discuss the basis for the rule adopted by the Board, pointing out that it was the rule which prevailed at common law and was applied by various administrative agencies prior to the adoption of the Wagner Act, that its appropriateness was contemplated by Congress, which authorized awards of "back pay" and rejected broader formulations of relief in terms of "substantial justice" or "restitution"; that its adoption clearly serves to effectuate the policies of the Act; and that the Board's practice has, in effect, been ratified by the reenactment of the Act without change in this respect. We shall then discuss respondent's contentions that because of the nature of unemploy-

ment compensation payments under Louisiana law, those payments should be regarded as direct rather than collateral benefits within the general rule which the Board has adopted, and its further contentions that the effect of the Board's order is to impose a penalty, and that the order is thus contrary to the decision of this Court in *Republic Steel Corp.* v. *National Labor Relations Board*, 311 U. S. 7.

I

IN THE EXERCISE OF ITS POWER TO FRAME REMEDIAL ORDERS WHICH WILL "EFFECTUATE THE POLICIES OF THE ACT," THE BOARD PROPERLY ADOPTED THE PRACTICE OF REFUSING TO PERMIT DEDUCTIONS FROM BACK PAY AWARDS OF COLLATERAL BENEFITS OTHER THAN EARNINGS, RECEIVED BY THE EMPLOYEE AS A CONSEQUENCE OF HIS UNLAWFUL DISCHARGE

The Act authorizes the Board, upon finding that an employer has committed an unfair labor practice, to require him "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." Section 10 (c). The Board and the courts have uniformly recognized that the purpose of Congress in empowering the Board to award back pay was not to provide a system for securing private rights to employees but to provide a method of enforcing the poli-

cies of the Act in the public interest.[4] *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 48–49; *Phelps Dodge Corp* v. *National Labor Relations Board*, 313 U. S. 177, 197; *Agwilines, Inc.* v. *National Labor Relations Board*, 87 F. 2d 146, 151 (C. A. 5). Since the vindication of public policy is to be accomplished by awards to the illegally discharged employees, the Board must exercise the discretion entrusted to it by Congress (*Phelps Dodge Corp.* v. *National Labor Relations Board*, *supra*, at p. 198) in determining the amounts appropriate to achieve this purpose. This Court has often noted that Congress vested in the Board broad discretion in the formulation of remedial orders.[5] Framing a reimbursement order "is a complex problem for the Board to decide in the light of its administrative experience and knowledge." *Virginia Electric & Power Co.* v. *National Labor Relations Board*, 319 U. S. 533, 543. Unless the Board's choice of means is arbitrary, it will not be upset. *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 194, 198. Its order "should stand unless it can be shown that the order is a patent attempt to

[4] H. Rep. No. 1147, 74th Cong., 1st Sess., p. 24.

[5] See, e. g., *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 194, 198; *Virginia Electric & Power Co.* v. *National Labor Relations Board*, 319 U. S. 533, 543; *Franks Brothers Co.* v. *National Labor Relations Board*, 321 U. S. 702.

achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co.* v. *National Labor Relations Board, supra,* at 540.

A. THE RULE ADOPTED BY THE BOARD IS THAT WHICH PREVAILED AT COMMON LAW AND HAS BEEN APPLIED BY OTHER ADMINISTRATIVE AGENCIES.

In exercising its informed discretion as to the measure of relief appropriate to a wrongfully discharged employee, the Board had available to it as a guide the standards which had been applied by courts and administrative agencies in allowing damages for wrongful discharge in breach of an employment contract or other legal obligation. At common law, damages for wrongful discharge in breach of employment contract were awarded to compensate for loss of earnings and were measured by the amount the employee would have earned had he not been discharged.[6] Collateral losses to the employee other than earnings lost were disregarded. The same measure of damages applied where time was lost as a result of a tort.[7]

Under the loss of earnings test only sums which the discharged employee earned, or failed without excuse to earn, were considered in mitigation of the employer's liability for the loss of earnings

[6] Williston on *Contracts* (Rev. Ed., 1937), Sec. 1358.

[7] McCormick on *Damages* (1935), pp. 309-310; *Restatement of the Law of Torts*, Sec. 924, Comment *c*.

resulting from the illegal discharge.[8] It was well settled that an employer's liability could not be reduced by showing that the employee had received collateral benefits other than earnings during the period of unlawful separation.[9]

The rationale for permitting deduction from the employer's obligation of sums which the employee earned in other employment was the fact that the discharge freed the employee to dispose of his services elsewhere.[10] The rationale for permitting deduction of sums which the employee failed without excuse to earn lay in the common law's concern for the "economic welfare and prosperity of the whole community."[11] Failure to deduct such sums from the amount paid to the employee would have fostered idleness to the obvious detriment of the community. Cf. *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177, 197–200. On the other hand to reduce the wrongdoer's obligation by crediting to him sums given or offered the employee by third parties, other than earnings, would not foster this or any other desirable social policy. It

[8] Williston on *Contracts* (Rev. Ed., 1937), Sec. 1358, *Restatement of the Law of Torts*, Sec. 924, Comment *c*.

[9] McCormick on *Damages* (1935), pp. 146, 310; Sutherland on *Damages*, 4th Ed. (1916), Vol. 1, Sec. 158, pp. 487, *et seq*; *Restatement of the Law of Torts*, Sec. 920, Comment *c*; 15 *Am. Jurisprudence*, *Damages*, Secs. 198–202.

[10] McCormick on *Damages*, p. 146.

[11] McCormick on *Damages*, p. 127.

would instead simply minimize the risks of unlawful conduct, thereby devitalizing the deterrent effect of the remedy, without any compensating social advantage. Thus, for example, a provision that unemployment compensation benefits received by the employee should *pro tanto* reduce the employer's back-pay obligation is not necessary to guard against the danger that discharged employees may wilfully remain idle. Under the unemployment compensation acts themselves employees must, as a condition of obtaining benefits, register for employment and continue to report to an employment office; if there is work available, and an employee refuses to accept it, the payment of benefits stops.[12]

For these reasons the common law courts have denied mitigation where the benefits received by the injured party took the form of unemployment insurance benefits,[13] railroad retirement annuity payments,[14] federal vocational rehabilitation payments,[15] receipts from an insurance

[12] Commerce Clearing House, *Unemployment Insurance Reporter*, Vol. 1, Treatise, Paragraph 1940, p. 4631.

[13] *Bang* v. *International Sisal Co.*, 212 Minn. 135, 4 N. W. 2d 113, 116.

[14] *McCarthy* v. *Palmer*, 29 F. Supp. 585, 588–589 (E. D. N. Y.), affirmed, 113 F. 2d 721, 723 (C. A. 2), certiorari denied, 311 U. S. 680; *Hetrick* v. *Reading Co.*, 39 F. Supp. 22, 24–25 (D. N. J.).

[15] *Cannien* v. *Superior Iron Works*, 175 Wis. 172, 187–188, 184 N. W. 767.

policy,[16] gifts,[17] workmen's compensation insurance or benefits[18] or charitable gifts.[19] The rule likewise applied without regard to whether the benefits received by the injured party came from a fund to which the employer contributed.[20] "The payment of such moneys, not being procured by the defendant, and they not having been paid or received to satisfy in whole or in part his

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[16] *Bangor & Aroostook R. Co.* v. *Jones*, 36 F. 2d 886, 890–891 (C. A. 1); *Brabham* v. *Baltimore & Ohio R. Co.*, 220 Fed. 35, 36 (C. A. 4); *Cox* v. *City of Chicago*, 83 Ill. App. 540, 542; *Louisville, etc., R. R. Co.* v. *Carothers*, 23 Ky. L. Rep. 1673, 1674, 65 S. W. 833; *Rusk* v. *Jeffries*, 110 N. J. L. 307, 311, 164 A. 313; *Littman* v. *Bell Telephone Co.*, 315 Pa. 370, 381, 172 A. 687; *Heath* v. *Seattle Taxicab Co.*, 73 Wash. 177, 186, 131 P. 843.

[17] *Hayes* v. *Morris & Co.*, 98 Conn. 603, 607–608, 119 A. 901; *Campbell* v. *Brandenburger*, 35 Del. 203, 209, 162 A. 354; *Nashville, etc., Ry. Co.* v. *Miller*, 120 Ga. 453, 457, 47 S. E. 959; *The Ohio, etc., R. W. Co.* v. *Dickerson*, 59 Ind. 317, 324; *Williams* v. *St. Louis, etc., Ry. Co.*, 123 Mo. 573, 585, 27 S. W. 387; *Illinois Cent. R. R. Co.* v. *Porter*, 117 Tenn. 13, 22–23, 94 S. W. 666.

[18] *Overland Construction Co.* v. *Sydnor*, 70 F. 2d 338, 340 (C. A. 6); *Liggett & Myers Tobacco Co.* v. *DeParcq*, 66 F. 2d 678, 687–688 (C. A. 8); *Pappas* v. *B. & O. R. Co.*, 37 F. 2d 271, 272 (C. A. 6); *Sprinkle* v. *Davis*, 111 F. 2d 925, 931 (C. A. 4).

[19] *Norristown* v. *Moyer*, 67 Pa. 355; cf. *Roth* v. *Chatlos*, 97 Conn. 282, 288, 116 A. 332; *Workmen's Compensation Board* v. *Rutherford*, 59 Ont. L. Rep. 364, 367.

[20] *Bang* v. *International Sisal Co.*, 212 Minn. 135, 4 N. W. 2d 113, 116; *Overland Construction Co.* v. *Sydnor*, 70 F. 2d 338, 340 (C. A. 6); *McCarthy* v. *Palmer*, 29 F. Supp. 585, 588–589 (E. D. N. Y.), affirmed, 113 F. 2d 721, 723 (C. A. 2), certiorari denied, 311 U. S. 680; *Hetrick* v. *Reading Co.*, 39 F. Supp. 22, 24–25 (D. N. J.).

liability, he can derive no advantage therefrom in mitigation of damages for which he is liable." Sutherland on *Damages*, 4th Ed. (1916), Vol. 1, Section 158, p. 487.

The common-law loss of earnings test had been adopted by tribunals which had, prior to adoption of the Wagner Act, been established by Congress to effectuate policies looking toward protection of employees against discharge for organizational activities.

Lost wages, sometimes specifically referred to as "back pay," had been awarded together with reinstatement by the National War Labor Board in 1918,[21] by the National Labor Relations Board acting under Section 7 (a) of the National Industrial Recovery Act,[22] and also by the only court faced with remedying a discharge in violation of

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[21] *Matter of Corn Products Refining Co.*, Docket No. 130, decided November 21, 1918, reported in U. S. Dept. of Labor, Bureau of Labor Statistics, Bulletin No. 287 (Dec. 1921), National War Labor Board, pp. 183–184 (Gov't. Printing Off., 1922); *Matter of General Electric Co.*, Lynn, Mass., Docket No. 231, decided October 24, 1918, reported *ibid.*, pp. 243–244; *Matter of Georgia Railway and Power Co.*, Docket No. 159, decided December 5, 1918, reported *ibid.*, pp. 214–215.

[22] *Matter of Chicago Defender, Inc.*, 1 NLRB (old) 119, 122, decided October 20, 1934; *Matter of Ralph A. Freundlich, Inc.*, 2 NLRB (old) 147, 148; *Matter of Philadelphia Cleaners & Dyers, Inc.*, 2 NLRB (old) 223, 225; *Matter of Westport Lumber Co.*, 2 NLRB (old) 261, 262; *Matter of Portland Cleaning Works*, 2 NLRB (old) 420, 421; *Matter of Davis Tailoring Co.*, 2 NLRB (old) 427, 429; *Matter of Nelson McCoy Pottery Co.*, 2 NLRB (old) 494, 495.

an injunction issued under the Railway Labor Act.[23] These agencies, following the common law rule, deducted from their awards amounts which the employees had earned during the period of wrongful discharge. The orders of the War Labor Board in 1918 and provided for the deduction of "earnings during the interim"; they did not provide for any other deduction.[24] Orders of the old National Labor Relations Board, the immediate predecessor of the NLRB, also provided only for the deduction of earnings.[25]

Thus, both the common law courts and administrative agencies had adopted, as the measure of damages for a wrongful discharge, a test which looked exclusively to earnings and which disregarded both collateral losses incurred by the employee and collateral benefits received by him. In many instances that test may result in a failure to make the employee completely whole. Employees who are unlawfully discharged often suffer a host of collateral losses during their period of unemployment. Even assuming ultimate dollar for dollar reimbursement, the time lag between dismissal and reimbursement often causes irreparable injury because workers rarely have sufficient sav-

[23] *Brotherhood of Railway and S. S. Clerks* v. *Texas & N. O. R. Co.*, 24 F. 2d 426, 434 (S. D. Tex.), affirmed, 33 F. 2d 13 (C. A. 5), affirmed, 281 U. S. 548.

[24] See cases cited in footnote 21, *supra*.

[25] *Matter of Chicago Defender, Inc.*, 1 NLRB (old) 119, 122; *Matter of Davis Tailoring Co.*, 2 NLRB (old) 427, 429.

ings to tide them safely over sustained periods of unemployment; if they did there would be no need of employment insurance. And they often have heavy commitments for rent, insurance, and installment payments which they are unable to meet even with the aid of unemployment benefits. Thus, apart from profound injury to morale and self-esteem,[26] unlawful discharges may result in forfeiture of rights under installment contracts and insurance policies, in mortgage foreclosures, in eviction for rent delinquencies, in distress sales of property at sacrifice prices or forced borrowing at burdensome interest rates, not to mention short rations, lack of heat and clothing, impairment of health, and like consequences which may befall the employee and his family as a result of the unlawful discharge.[27] Some statutes have attempted to provide a rough measure of compensation for such losses by allowing awards of twice the back pay. (See *infra*, p. 59.)

By the same token, the refusal to allow a deduction for collateral benefits might in some instances result in the receipt by the employee of more than if he had not been wrongfully discharged. The common law rule, however, uniformly ignored these possibilities that the award might, in some cases, be substantially less than compen-

[26] See *National Labor Relations Board* v. *American Potash & Chemical Corp.*, 113 F. 2d 232, 235 (C. A. 9).

[27] See Calkins, Clinch, *Some Folks Won't Work*, Harcourt, Brace & Company, New York, 1930.

satory, and in others more than compensatory, regarding it as sufficient to apply the simpler test of looking only at earnings lost and alternative earnings received in the belief that in general that test would result in approximate fairness.

B. CONGRESS, IN AUTHORIZING AWARDS OF "BACK PAY," CLEARLY CONTEMPLATED THAT THE AMOUNT OF SUCH AWARDS MIGHT BE BASED ON THESE COMMON LAW PRINCIPLES

In authorizing the Board to direct the employer to take "such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act," Congress, as we have seen, did not seek to impose any stereotyped formula. "The remedy of back pay, . . . is entrusted to the Board's discretion; it is not mechanically compelled by the Act." *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 198. In particular, this Court has made it clear that the relief which can be granted to the employee need not be limited to "questions of monetary loss." *Id.*, at 193. Nevertheless, the express authorization in the Act of an award of "back pay" is highly significant for present purposes. By indicating that "back pay" was an appropriate measure of the relief that might be afforded, Congress would seem clearly to have had in mind the kind and measure of relief that had been applied by the common-law courts and earlier administrative agencies. Congress contemplated that the employer guilty of unfair labor

practices, like the tortfeasor at common law,[28] could be required to "restore to the employees in some measure what was taken from them because of the Company's unfair labor practices." *Virginia Electric and Power Company* v. *National Labor Relations Board*, 319 U. S. 533, 543. As a permissible measure of such compensation, Congress clearly had in mind the standard of proven efficacy at common law. (See *Virginia Electric & Power Co.* case, *supra.*) The legislative history shows that Congress intended by using the phrase "back pay" to authorize the Board to award an unlawfully discharged employee "compensation for the *time that he has lost through unlawful discharge.*" [Emphasis added.][29]

The concept of "time lost" which is embodied in the phrase "back pay," was a direct outgrowth of the common law loss of earnings test which had been applied not only by the courts but by the early administrative tribunals in effectuating policies similar to those embodied in the Wagner Act. The test reflected a deliberate judgment of courts and administrative

[28] Cf. *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. 2d 862 (C. A. 2; *National Labor Relations Board* v. *Stackpole Carbon Co.*, 105 F. 2d 167, 176 (C. A. 3); *Packard Motor Co.* v. *National Labor Relations Board*, 330 U. S. 485, 489.

[29] Memorandum Comparing S. 2926 (73d Cong.) with S. 1958 (74th Cong.), dated March 11, 1935, Senate Committee Print, 74th Cong., 1st Sess., p. 4, reprinted in Legislative History of the National Labor Relations Act, 1935 (Gov't. Print. Off. 1949), p. 1324.

agencies as to the measure of restitution appropriate to compensate for wrongful discharge; it was of proven workability and was easily integrated into the statutory scheme.

Congress' adoption of the "back pay" formula resulted from a deliberate choice between competing policies. Early versions of the bill which became the Wagner Act would have authorized the Board to measure awards to unlawfully discharged employees by such broad standards of absolute loss as "substantial justice" and "restitution."[30] Under those standards, had they been adopted, it could have been argued that Congress had rejected the common-law tests (which, as we have pointed out, were not always fully compensatory) and had required consideration of collateral losses suffered by the employee in addition to his loss of earnings. If such collateral losses were to be considered it might have been appropriate also to consider collateral benefits in mitigation of the employer's obligation. Congress, however, rejected these broad formula-

[30] S. 2926, Original Senate Print, 73rd Cong., 2nd Sess., Sec. 205 (c); S. 4958, Original Senate Print, 74th Cong., 1st Sess., Sec. 10 (d); S. 1958 as reported, 2nd Senate Print, 74th Cong., 1st Sess., Sec. 10 (c). These bills are reprinted in Legislative History of the National Labor Relations Act, 1935 (G. P. O., 1949), pp. 7, 1302, 2292, respectively. See Senate Memorandum Comparing S. 2926, 73d Cong., with S. 1958, 74th Cong., 1st Sess., pp. 4, 34, reprinted in Legislative History of the National Labor Relations Act, 1935, *supra*, at pp. 1324, 1360.

tions and provided instead for the award of "back pay", thus clearly authorizing the Board to apply the common-law rules under which collateral losses and collateral benefits were alike disregarded.

C. THE BOARD COULD PROPERLY DETERMINE THAT THE APPLICATION OF THE COMMON LAW RULES EXCLUDING COLLATERAL BENEFITS AND LOSSES FROM THE MEASURE OF A BACK PAY AWARD WAS APPROPRIATE TO EFFECTUATE THE PURPOSES OF THE ACT

As we have seen, Congress would appear to have contemplated that in allowing back pay it would be appropriate for the Board to be guided by the common law principles which exclude collateral losses and gains. Even absent any such indications in the legislative history of the Act, however, it would have been clearly appropriate for the Board to look to those principles for guidance.

The "back pay" which Congress, in Section 10 (c), authorized the Board to award to victims of discriminatory discharge was designed to serve essentially the same functions as an award of compensatory damages to one discharged in breach of a contract of employment. The back pay award "resemble[s] compensation for private injury" (*Virginia Electric and Power Co.* v. *National Labor Relations Board*, 319 U. S. 533, 543). Although the award is not made "in the interest of the employee, but in the interest of the public" (*Agwilines, Inc.* v. *National Labor*

Relations Board, 87 F. 2d 146, 151 (C. A. 5)), it is designed, like an award of damages, both to compensate for the injury and to discourage future wrongdoing.[31] Both functions serve in "vindication of the public policy which the Board enforces." *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 197.

From its earliest days, the Board has applied the loss of earnings test, and its corollary that neither collateral losses nor collateral benefits may be considered, in fixing the amount of the back pay obligation.[32] It is the Board's practice to measure the sum due by the amount the employee would have

[31] The award of compensatory damages for illegal discharge at common law serves to compel "citizens to observe in varying circumstances an appropriate measure of prudence to avoid causing harm to one another." Pollock on *Torts*, 12th ed., p. 21; see also Austin on *Jurisprudence*, 5th ed., Vol. 1, Lecture XXII, p. 443, *et seq.* And while Congress eschewed fines and penalties there can be no doubt that it conceived the function of the back pay award in part as a deterrent "so that employers are less likely to engage in unfair labor practices." *National Labor Relations Board* v. *Carlisle Lumber Company*, 99 F. 2d 533, 538 (C. A. 9). See the concurring opinion of Mr. Justice Black and Mr. Justice Douglas in *Republic Steel Corp.* v. *National Labor Relations Board*, 311 U. S., at p. 14. Cf. *National Labor Relations Board* v. *Williamson-Dickie Mfg. Co.*, 130 F. 2d 260, 263 (C. A. 5).

[32] *Clinton Cotton Mills*, 1 NLRB 97, 121 ("losses of pay"); *Carlisle Lumber Company*, 2 NLRB 248, 278 ("loss of wages"); National Labor Relations Board, First Annual Report (1936), p. 129; *id.*, Second Annual Report (1937), p. 152.

earned but for the discharge, subtracting therefrom such sums as the employee earned (or failed without excuse to earn)[33] during the back pay period.[34] The Board does not take into account as increasing the employer's back pay obligation the manifold collateral losses which frequently flow from discriminatory discharges, such as distress sales of property, impairment of physical and mental health, forced borrowing at burdensome interest rates and the like (*supra*, p. 17). Concomitantly, the Board does not take into account as diminishing the employer's obligation receipts other than earnings by the discharged employee from such sources as home relief,[35] union relief,[36] veterans disability

[33] This provision was adopted in deference to this Court's decision in *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177. As we have pointed out, amounts which the employee failed without excuse to earn are deductible at common law (see p. 17; *supra*). Hence, the *Phelps-Dodge* decision in this aspect confirms the appropriateness of looking to the common law standard as a guide. Moreover, wilful losses are deductible in conformity with the social objective of discouraging idleness and permitting full employment. As we have shown, *supra*, pp. 18–19, no such considerations warrant deduction of collateral benefits such as unemployment compensation.

[34] National Labor Relations Board, First Annual Report (1936), p. 129; *id.*, Second Annual Report (1937), p. 152; *id.*, Third Annual Report (1938), p. 202.

[35] *Vegetable Oil Products Co., Inc.*, 5 NLRB 52, 53; *Oil Well Mfg. Corp.*, 14 NLRB 1114.

[36] *Missouri-Arkansas Coach Lines, Inc.*, 7 NLRB 186, 206; *Berkshire Knitting Mills*, 17 NLRB 239.

compensation,[37] or unemployment compensation funds.[38]

The Board's practice is thus, as we have shown, essentially that of the common law courts.[39] While this Court has held that the Board's discretion in framing its remedial orders may not be fettered by "compelling it to observe conventional common law or chancery principles" (*Virginia Electric and Power Co.* v. *National Labor Relations Board*, 319 U. S. 533, 542), we know of no principle that precludes it from applying common law rules where they are deemed appro-

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[37] *Oil Well Mfg. Corp.*, 14 NLRB 1114; *Louis Hornick & Co., Inc.*, 2 NLRB 983.

[38] *Missouri-Arkansas Coach Lines, Inc.*, 7 NLRB 186, 206; *Jefferson Lake Oil Co., Inc.*, 16 NLRB 355, 405; *Walter Stover*, 15 NLRB 635, 651; *Pennsylvania Furnace and Iron Co.*, 13 NLRB 49, 55.

[39] Although adhering to common-law practice in determining allowable losses and deductions, the Board has recently announced a departure from the common-law rule on a question of method of computation. *F. W. Woolworth Co.*, 90 NLRB, No. 41. Under the new rule, the Board will compute back pay on a quarter-year period rather than on a total separation period basis. This rule was adopted because it has appeared that in some cases, under the total period method, high earnings received by the employee during the latter part of the back pay period served to wipe out the prior loss of earnings, thus giving employers an incentive to delay reinstatement as long as possible. By adopting the quarter-year period as the basis for computation, the Board has sought to eliminate such an incentive and thereby to promote the efficacy of the reinstatement remedy. Because the reinstatement remedy conferred by the Act was unknown to the common law, no comparable problem had been created in the application by the courts of the total period method.

priate to the effectuation of the Act's purposes. In the present situation the similarity of objective served by the practice in both forums—promotion of social policy by deterring wrongdoing and compensating the injured employee—establishes beyond question the rationality and appropriateness of its adoption by the Board.

The tested practicability of the rule itself commends its adoption. A rule of absolute loss would require the Board to take into account an infinite variety of incidental benefits which the discharged employee may have received—such as contributions from friends, relations, charities, union benefits, and relief payments—in whatever form and of whatever nature (including food, clothing, coal, etc.) which would not have been received but for the discharge. On the other hand, to be fair to the employee, the Board would also have to explore and give weight to innumerable collateral losses, both tangible and intangible. "Whether and to what extent such matters should be considered is a complex problem for the Board to decide in the light of its administrative experience and knowledge." *Virginia Electric & Power Co. v. National Labor Relations Board, supra,* 543. Whatever advantages might flow from such a rule in permitting a closer approximation to absolute restitution would, in the Board's view, be far outweighed by the administrative difficulties attendant upon its application. Hence the

Board was clearly justified in confining its inquiry to earnings.

The holding of this Court in the *Virginia Electric* case, *ibid.*, that it would be "wrong * * * to force [the Board] to inquire into the amount of damages actually sustained" is decisive of the Board's power to disregard both collateral losses and collateral benefits in computing loss of earnings. In that case the Court sustained the Board's refusal to consider, in mitigation of the employer's obligation to reimburse employees for dues illegally checked off by him, collateral benefits which, the employer argued, had accrued to the employees from the dues deductions. As in this case, the Board limited its consideration to the definite ascertainable losses of the employees involved; it "determined that the employees suffered a definite loss * * * and that the effectuation of the policies of the Act requires reimbursement * * * in full." The Court rejected the Company's contention that "this considered judgment [of the Board] does not effectuate the statutory purpose."

Apart from the decision of the court below, the only two courts of appeals which have considered the Board's practice of refusing to diminish the employer's back pay obligation by deducting collateral benefits have approved and sustained it. *National Labor Relations Board v. Marshall Field*

& Co., 129 F. 2d 169 (C. A. 7), affirmed on other grounds, 318 U. S. 253, and *National Labor Relations Board* v. *Brashear Freight Lines, Inc.*, 127 F. 2d 198 (C. A. 8). In the *Marshall Field* case the court sustained the Board's refusal to permit the deduction of unemployment compensation benefits from back pay award, saying (129 F. 2d, at p. 172):

> In ordering the respondent to pay the reinstated employees their lost wages less only net earnings, the Board has followed well-established rules of damages, long used in tort and contract actions.
>
> * * * * *
>
> In the Restatement of the Law of Torts, Sec. 924, Comment (e), it is said that: "The damages (for loss of earnings) are not reduced by the fact that the plaintiff has suffered no net financial loss as the result of the entire transaction, as where he receives insurance money or an amount equal to his lost wages from his employer or from a friend."
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> * * * * *
>
> * * * The wrongdoer may not be benefited by collateral payments made to the person he has wronged.

In the *Brashear* case the Court of Appeals for the Eighth Circuit likewise found the common law analogy persuasive. The court there rejected the employer's claim that he had the right to deduct from the back pay due the value of grocer-

ies received by the discharged employee from his union. The court said (127 F. 2d 198, 199):

> * * * our order could not, we think be interpreted as intending to give the employer, found to be a wrongdoer, the benefit of gifts or other collateral benefits received by the former employee during his period of unemployment. If is enough that it is permitted to deduct what he earned as wages. The general rule that a tortfeasor is not entitled to reduction of damages because the injured one has had the benefit of insurance payments or other collateral benefits would seem to be analogous.

D. THE REENACTMENT OF THE BACK PAY PROVISIONS WITHOUT CHANGE IN THE TAFT-HARTLEY ACT IS A LEGISLATIVE RATIFICATION OF THE BOARD'S PRACTICE

This construction of the Act and of its powers thereunder, adopted by the Board immediately after the Act's passage and consistently adhered to since, is entitled to great weight in the interpretation of the Act. *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294. Here that weight is greatly increased by the fact that Congress, in recent comprehensive amendments to the Act made after exhaustive study of the practical workings of its provisions, did not change the back pay provisions.

When Congress amended the National Labor Relations Act by the Labor-Management Relations Act, the Board had been following the practice

of disallowing deduction for collateral benefits such as unemployment compensation for a period of twelve years. The Board had repeatedly, in its Annual Reports, called the attention of Congress to this practice.[39] During this entire period the Board's practice had been challenged before courts of appeals in only two cases, and in both cases it had been sustained. Thus, at the time the Taft-Hartley Act was passed there was not only a history of uniform administrative policy and practice in the application of the back pay remedy, but uniform judicial approval of that policy and practice as well.

In the course of adopting the 1947 amendments Congress considered in great detail the provisions of the Wagner Act as they had been applied by the Board.[41] Congress made extensive changes, many of which were dictated by dissatisfaction with policies which the Board had adopted.[42] Congress also considered the back pay provision, but amended it only by including a provision that back pay could be assessed against labor organizations as well as employers.[43] Under these cir-

[39] National Labor Relations Board, *Third Annual Report*, p. 202, n. 11; *Fourth Annual Report*, p. 100, n. 25; *Eleventh Annual Report*, p. 50.

[41] See 80th Cong., 1st Sess., House Report No. 245 on H. R. 3020 and Senate Report No. 105 on S. 1126.

[42] See 80th Cong., 1st Sess., House Conference Report No. 510 on H. R. 3020.

[43] *Id.*, at p. 54.

cumstances the inference is irresistible that it was because Congress approved the Board's practice that it reenacted the back pay provision without material change. Cf. *Helvering* v. *Reynolds Co.*, 306 U. S. 110, 114–115; *Brewster* v. *Gage*, 280 U. S. 327, 337; *Norwegian Nitrogen Co.* v. *United States*, *supra*, 313–315.

II

THESE PRINCIPLES WERE CORRECTLY APPLIED TO DENY DEDUCTION OF THE UNEMPLOYMENT COMPENSATION RECEIPTS HERE INVOLVED

A. UNEMPLOYMENT COMPENSATION RECEIPTS ARE COLLATERAL AND NOT DIRECT BENEFITS

As we have seen, the Board's policy of disregarding collateral losses and benefits in the computation of back pay accords fully with the terms of the Act and effectuates its policy. The Company seeks to avoid the operation of this rule, however, by contending that the unemployment compensation benefits here involved are "direct" rather than "collateral." In support of this position, it has argued that what the employee receives from the fund during unemployment comes from the employer's payments.

In the first place it should be pointed out that courts applying the common law "loss of earnings" test have uniformly held that unemployment compensation benefits and railroad retirement annuities, to which the employer has

contributed, are collateral and not direct." And the Court of Appeals for the Seventh Circuit specifically held in the *Marshall Field* case, *supra*, at pp. 172–173, that despite the employer's contribution to the fund, the employer does not have "such an interest in the payments that they should be credited to its account." The court pointed out (*ibid*):

> The benefits in question were paid by the State, not by respondent. How the State raised the funds is a matter between the State and its taxpayers.

These holdings are manifestly sound. Benefits other than earnings paid to discharged employees are deemed direct rather than collateral only when "procured by the [employer]" or where they have "been paid or received to satisfy in whole or part his liability."[45] It is true that employers are taxed to maintain the Louisiana Unemployment Compensation Fund, from which benefits are paid to unemployed persons. But employers do not, by paying their taxes, *pro tanto* purchase immunity from responsibility for the injuries they inflict by unlawfully discharging employees. It may be doubted whether an employer could lawfully purchase an insurance policy to indemnify himself against the risks of

[44] See note 20, *supra*.

[45] Sutherland on *Damages*, *supra*, Sec. 158, p. 488.

such unlawful conduct.[36] Yet to treat unemployment compensation payments as benefits attributable to the employer and deductible from his back pay obligation would in effect transform the unemployment compensation system into a form of insurance against the consequences of violating the National Labor Relations Act. It is apparent that such a result would tend to minimize the risks involved in illegally discharging employees, thereby encouraging would-be violators of the Labor Relations Act, in the teeth of Congressional policy.

Unemployment compensation laws were not designed for any such purpose. Unemployment compensation is not simply a mass insurance of private risks; it is social insurance. It is part of a nationwide system created by statute and enforced by public agencies to achieve broad social and economic objectives. Those objectives can be found stated not only in the policy statement of the Louisiana law (Dart's Sec. 4434.1), but in that of practically every state unemployment compensation law.[37] Such laws provide a means of systematizing and rationalizing haphazard methods for relieving distress

[36] At common law a contract to save the promisee harmless from the consequences of an unlawful act is against public policy and invalid. Williston on *Contracts*, (Rev. ed.), Sec. 1751. *Restatement, Contracts*, Sec. 572.

[37] These laws are compiled in Commerce Clearing House, *Unemployment Insurance Service*.

resulting from technological, seasonal, cyclical, and other types of economic unemployment which have become "a permanent incident of our industrial system." *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 515–516. They also tend to encourage employers to stabilize employment practices and generally provide for more favorable economic conditions by maintaining the purchasing power of the community.[48]

Although wrongfully discharged employees share with the victims of other types of unemployment in the benefits of the fund, it is apparent that the wrongdoing employer cannot, consistently with the objectives of the federal social security policy, the Louisiana Act or the National Labor Relations Act, claim credit for the payment of the benefits. To permit him to do so would permit him, in derogation of the policy embodied in the Labor Relations Act, to shift from himself to the fund his obligation to make restitution for the injury he has inflicted. Such a result would also pervert the basic objectives of the social security policy to foster stable employment and minimize the risks of economic insecurity, by diverting the unemployment compensation funds to the unintended function of insuring employers against the consequences of illegal discharges.

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[48] Clague, Ewan, *The Economics of Unemployment Compensation* (1945), 55 Yale Law Journal 53, 69.

The fact that the unemployment compensation system is financed by taxes levied on employers is purely incidental to its purpose and effect. "The Unemployment Compensation Act is primarily a public welfare measure and the levying of taxes thereunder is merely incidental to its purpose, which is to assure a measure of security against the hazard of unemployment in our economic life." *Unemployment Compensation Commission* v. *Collins*, 182 Va. 426, 438, 29 S. E. 2d 388, 393. Indeed, the method by which unemployment compensation funds are financed varies with different parts of the program and in different states. While in most states, as in Louisiana, unemployment compensation is financed entirely by employer contributions, in a few states employee contributions are also made (C. C. H. *Unemployment Insurance Reporter*, Vol. 1, Charts, pp. 4111–4112.)[40] Although state law may characterize the

[40] In view of this fact the Company's position would create endless uncertainties. Would the employer have a different rule apply for a State where an employee makes a contribution under the unemployment compensation law? And if so, would there be an apportionment of the mitigation in terms of relative proportions of the employer contributions and the employee contributions? Would a different rule apply for old-age and survivors insurance where contributions by employers and employees are joined by contributions from the general fiscal resources of the Federal Government? And if so, would a different rule apply with respect to the operations of old-age and survivors insurance during the early years of the program when a special bounty is given to aged individuals, than would apply to the later years of the program when normal actuarial principles operate?

employer's payments made to an unemployment compensation fund as "contributions" and although a state may have chosen to raise the fund by levies only on employers rather than on general public, this Court has recognized that the employers' payments are none the less "taxes." *Carmichael* v. *Southern Coal Co.*, 301 U. S. 495, 508–509; *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 578–583. Clearly, the fact that the employer is compelled by the state to pay taxes which the state uses to finance its program of unemployment compensation, is not sufficient to stamp the fund with a private rather than a public character, or to attribute to the employer directly, payments which the state makes from the fund.[50] In the *Carmichael* case, *supra*, this Court, speaking

[50] See the statement of the New York Court of Appeals discussing the New York unemployment compensation law (*Matter of Cassaretakis*, 289 N. Y. 119, 126, 44 N. E. 2d 391, 394–395, affirmed *sub nom. Standard Dredging Co.* v. *Murphy*, 319 U. S. 306):

"This tax is an excise based upon the exercise of the privilege of employing individuals. * * * The obligations of the employer under the law are not to his employees but to the State. Likewise, claimants of benefits assert their rights against the State and not against the employer. The employer's duty to pay contributions and the employee's right to receive benefits are independent of each other. The employer must continue to pay the tax although none of his employees ever become entitled to benefits through lack of employment; the employee has a right to receive benefits upon becoming unemployed although his employer has failed to contribute."

of the Alabama Unemployment Insurance tax, stated (301 U. S. at pp. 522–523):

> A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. * * * Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve the abandonment of the most fundamental principle of government—that it exists primarily to provide for the common good.

That payments to discharged employees out of the unemployment compensation fund are not attributable to the wrongdoing employer's contributions is further demonstrated by the fact that under the Louisiana law, as under most such laws, the employer's contributions are not segregated, but are placed in a pooled fund deposited with the Secretary of the United States Treasury, out of which benefits are paid. (Dart's, Sec. 4434.8, Appendix, 71, *infra*.) The law specifically provides that "All moneys in the fund shall be mingled and undivided" (*ibid.*) and that neither the employer nor the employee shall have any prior claim to the monies paid into the fund by the employer (Dart's Sec. 4434.6 (c) (1), Ap-

pendix, 68, *infra*). Here, as in the *Marshall Field* case, 129 F. 2d 169, 173, "Respondent is not the only employer who is taxed under the [Louisiana] Act, nor are benefits to its discharged employees limited to the amounts paid by respondent." (Dart's, Sections 4434.2 (a) (b) (c) and (d), Appendix, 64–66, *infra*). It is therefore impossible to trace or establish any connection between the tax paid by the employer and the benefit collected by the employee.[51]

Finally, it should be noted, the Company would have had to pay the same amount of tax even if Louisiana had never enacted the law under which benefits may be paid to its employees. The Federal Unemployment Tax Act (49 Stat. 636, amended 53 Stat. 1387, 1388, 26 U. S. C. 1600–1601, Appendix, 63, *infra*) imposes a tax of 3 percent on each employer's pay roll, but permits him to deduct therefrom taxes paid to a State unemployment compensation fund up to 90 percent of the Federal Tax. The Louisiana tax of 2.7 percent is 90

[51] Indeed, the discharging employer may never even be charged, for purposes of computing his experience rating, with the benefits paid to the employee discharged by him. Under the Louisiana Law only base period employers are chargeable with benefits paid a claimant (Dart's Sec. 4434.6 (c) (1), Appendix, 68, *infra*). Since the base period comprises the *first four* of the last five quarters immediately preceding the date of the claim for benefits, an employer may discharge a newly hired employee and suffer no charges against his rating account. (Dart's Sec. 4434.18 (o) and (p), Appendix, 74, *infra*).

percent of the Federal tax (Dart's, Sec. 4434.6 (c) (2) (3), Appendix, 68–69, *infra*).

In sum, the company's argument that it is entitled to deduction merely because it has contributed to the fund from which the unemployment compensation benefits were paid is no more valid than a corporate taxpayer's claim that it should receive a tax refund because it has no children who use the public schools.[32] As the court pointed out in the *Marshall Field* case, *supra*, at page 173, "if the benefits had been paid by a private charitable organization to which respondent had contributed, surely respondent would not claim that it had such an interest in the payments that they should be credited to its account."

In support of its argument that the benefit payments flow directly from its contributions to the fund petitioner asserts that its rate of contribution is very greatly affected by the amount of unemployment compensation benefits which discharged employees receive. Even assuming the soundness of this assertion, it would not establish that the benefits were direct rather than collateral. For the benefits are paid by the State, not by the Company. "If the unemployment fund had been raised by general taxation, surely [the company] could not contend successfully that the benefits were not collateral because their payment might increase its rate of tax". *National Labor Rela-*

[32] Cf. *Thomas* v. *Gay*, 169 U. S. 264, 280.

tions Board v. *Marshall Field & Co.*, 129 F. 2d 169, 173 (C. A. 7). The fact that the fund is raised by special tax levied only upon employers rather than by a general tax does not establish that the taxpayer has such an interest in the proceeds as to enable him to claim that the disbursement is made on his behalf rather than on behalf of the state. *Carmichael* v. *Southern Coal Co.*, *supra*, pp. 522–523. That funds to finance the unemployment compensation system are obtained by taxes levied on employers only does not mean that the unemployment compensation system was conceived of as a financial responsibility law, designed to insure that employers would meet some legal obligation to employees whom they discharge. The law imposes no such obligation unless the discharge was wrongful. The tax was levied only on employers and the tax rate was designed to vary with the amount of unemployment chargeable to each employer, not because employers were thought to be financially liable to all employees whom they dismiss, but because it was believed that such a plan would tend to effectuate the Act's policy of stabilizing employment by discouraging layoffs and discharges.[53]

There is a further reason why the Board would be justified in disregarding any possible effect of

[53] Arnold, Almon R., *Experience Rating* (1945), 55 Yale Law Journal 219–223. For other reasons leading to the decision to tax employers only, see Millis & Montgomery, *Labor's Risks and Social Insurance* (McGraw Hill, 1938), p. 161.

its award on the Company's state tax rate. Any additional taxes would be the result of state, not federal law, designed to effectuate a wholly different public policy from that which the Board is charged with enforcing. Cf. *Frick, et al.* v. *Pennsylvania*, 268 U. S. 473, 498–9; *United States* v. *Lanza*, 260 U. S. 377, 382; *California* v. *Zook*, 336 U. S. 725, 738. As the Court pointed out in the *Marshall Field* case, *supra*, "if the payment of the benefits increases respondents' tax rate, the increase is caused not by the order of the Board, but by the law of the State" (129 F. 2d at p. 173). As this Court has held in *Republic Steel Corp.* v. *National Labor Relations Board*, 311 U. S. 7, it is not the function of the Board, in framing its orders, to concern itself with the effectuation of policies of other governmental agencies.

In any event, the Company's assumption that an employer's tax rate is automatically affected by benefit payments to wrongfully discharged employees is without foundation. Under the Louisiana Law, whether an employer's rate of contribution may be reduced below the maximum rate of 2.7 percent, is dependent upon a variety of complex factors. The first relates to the solvency of the state fund. No employer's rate may be reduced unless the total amount in the State fund equals or exceeds 35 million dollars or 1.5 percent

of the total pay rolls subject to the Act for the last 5 consecutive calendar years, whichever is greater (Dart's, Sec. 4434.6 (c) (6), Appendix, 70, *infra*). The second relates to the length of time the particular employer participated in the unemployment compensation system. Thus, no employer's rate may be reduced from 2.7 percent unless it was chargeable with benefits throughout the 36 consecutive calendar months ending on the computation date. (Dart's, Sec. 4434.6 (c) (3), Appendix, 68–69, *infra*).

The third relates to the relative amount of unemployment attributable to the particular Company. In order to qualify for a reduced rate of contribution the employer must have a favorable experience rating (Dart's, Sec. 4434.6 (c) (1) (2) (3) (4) (I), Appendix, 68–70, *infra*). The two elements crucial in computing the experience rating are the amount of contributions which the employer has paid into the fund and the amount of benefits which have been charged against him. The accumulated amount of benefits charged to the employer since the beginning of the program are subtracted from the accumulated contributions and the result (known as excess) is divided by the average annual pay roll of the employer for the 3 years preceding the rating period (*ibid.*). The resultant ratio determines the employer's

contribution rate.[54] In view of these complex factors which enter into the determination whether particular discharges affect any employer's rate it becomes pure speculation to argue, as the Company has, that the amount of unemployment compensation benefits received by these discharged employees will very greatly affect the company's rate of contribution.

Moreover, had the Company's rate of tax actually been affected by the payment of benefits to the discharged employees the Company could have introduced evidence of such change in this proceeding. The Company at no time offered evidence before the Board or the Court below that any such change had occurred or would occur. Since information as to this matter was peculiarly within the employer's knowledge, it is fair to assume that no change occurred.[55]

Finally, to whatever extent charges against the employer's account resulting from payments

[54] During the experience rating year beginning October, 1947 (the discharges here involved occurred in May, 1948), this contribution rate was 2.7, the maximum, where an employer's ratio of excess to average annual pay roll was less than 4.9 percent. Where an employer's ratio was between 4.9 and 5.44, the rate of contribution dropped three tenths of one percent to 2.4 percent. The rate of contribution was gradually scaled down to a minimum of nine-tenths of one percent where an employer's ratio was 7.6 percent or more (Dart's, Sec. 1434.6 (c) (4) (1) (c), Appendix, 69–70, *infra*).

[55] See *Interstate Circuit, Inc., et al.* v. *United States*, 306 U. S. 208, 226; *Clifton* v. *United States*, 4 How. 242, 247.

to the discharged employees may have adversely affected the employer's experience rating, those charges might be expunged, upon the employer's payment of back pay under the Board's order. Under the decision of this Court in *Social Security Board* v. *Nierotko*, 327 U. S. 358, 364–367, "back pay" awarded under an order of the Board constitutes "wages," and the recipient of a back pay award is not deemed to have been unemployed during the back pay period. Upon the issuance of such an order the employer may call the attention of the state unemployment compensation board to this fact, which establishes that the employee was, as a matter of law, in employment status during the benefit perio ', and request that the charges against his account be expunged in the light of this subsequently acquired informatiofi.[56]

[56] The Louisiana Law permits an employer to contest amounts charged to his experience account (Dart's, Sec. 4434.6 (c) (8), 4434.13 (f) (1), Appendix, 71, 73, *infra*). Although the former Section requires the employer to file his claim for review of charges against his account within 30 days from notification of those charges, an employer whose claim grows out of an order issued by the Board long after the discharges took place and after the benefits were paid, could perhaps argue that the 30 day limitation was inapplicable because the grounds for review did not arise until after expiration of the usual period. Section 4434.13 permits the employer to apply for a refund in the case of contributions erroneously collected within three years after the date of payment, and this Section might be deemed applicable also to a meritorious claim for review of charges.

B. THE EMPLOYEE IS NOT MADE MORE THAN WHOLE BY THE BOARD'S ORDER

In *Republic Steel Corp.* v. *National Labor Relations Board*, 311 U. S. 7, 9, this Court recognized that the remedial function of a back pay order was "to make the employees whole" for loss of earnings occasioned by their illegal discharge. The Court explained that "The amounts *earned* by the employees [after discharge but] before reinstatement were directed to be deducted from their back pay manifestly because, having already been received, these amounts were not needed to make the employees whole." [Italics added.]

In that case the "make-whole" principle required deduction of amounts received by discharged employees, though paid by governmental agencies, because they were earnings. And the Court clearly indicated that it was the character of the payments as "earnings" which led to their deductibility, for it emphasized that "the amounts paid by the governmental agencies were for services actually performed. Presumably these agencies, and through them the public, received the benefit of services reasonably worth the amounts paid."

While the "make-whole" principle thus requires deduction from the back pay obligation of interim earnings, regardless of their source, it neither contemplates nor permits deduction of collateral benefits, other than earnings, received from persons

other than the employer. This result is inherent in the concept of the "make-whole" remedy as compensation for loss of earnings. Since, in computing the employer's gross back pay obligation, only loss of earnings is considered, collateral losses to the employee being disregarded, consistency requires that collateral benefits to the employee should not be considered as diminishing the back pay obligation. To allow collateral benefits to reduce the award, while not allowing collateral losses to increase it, would be manifestly unfair.

The Company's argument that denial of deduction of unemployment compensation benefits results in an award which makes the employee more than whole thus rests upon the fallacious premise that, in computing the employee's net loss attributable to the discharge, collateral benefits but not collateral losses should be considered. Such a rule, as we have shown (*supra*, pp. 26–27, 31) would be manifestly unfair and wholly incompatible with the policy of the Act. *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 197–198. Unless employees are to be made whole for collateral losses such as those suggested above (*supra*, p. 23), it is manifestly unsound to argue that failure to deduct collateral benefits such as unemployment compensation will result in the employee's being made more than whole.

Moreover, to treat sums received from unemployment compensation funds as an offset to the loss

which wrongfully discharged employees sustain is to overlook the fact that such sums may ultimately be recovered by the state from the employee to whom back pay has been awarded. As the court pointed out in the *Marshall Field* case, 129 F. 2d, at 173, whether recipients of back pay should also be permitted to retain sums paid to them out of the State unemployment insurance fund is "a question between the employees and the [State] * * *." When it appears that employees to whom benefits were paid have, as a matter of law, not been unemployed and have in fact received wages in the form of back pay from their employer, see, p. 49, *supra*, the state may seek to recoup the unemployment compensation benefits, as having been improvidently granted. Subsequent to this Court's holding in the *Nierotko* case, *supra*, a number of states have recouped unemployment insurance benefits in circumstances such as these. Thus, the New York Supreme Court, Appellate Division, upheld an order directing such recoupment, holding that since the employees had been awarded back pay by order of the National Labor Relations Board, for the period of separation they did not suffer "total unemployment" within the meaning of the New York Act and hence were not entitled to retain the unemployment compensation benefits.[37] To treat

[37] *Frances T. Skutnik, et al. v. Edward Corsi, as Industrial Commissioner*, 51 N. Y. S. 2d 741. To the same effect see Decision of California Unemployment Appeals Board, March 3, 1948, No. 8169, Reported in Unemployment

unemployment compensation benefits which the state may ultimately recoup from the employee as an offset to the employer's back pay liability would thus result not only in making the employee less than whole, since collateral losses are not considered, but in depriving the employee even of back wages in a sum equivalent to the unemployment compensation benefits which the state recoups.

This argument is not affected by the fact that Louisiana may choose as a matter of policy not to recoup unemployment compensation benefits. The Board is empowered to decide as a matter of federal law whether unemployment compensation benefits should or should not be deducted from its back pay awards, and its policy need not vary with the divergent policies of the several states with regard to recoupment.[38]

Finally, aside from the possibility of recoupment by the states, receipt of unemployment compensation benefits results in losses to the employee which militate against deduction of such benefits

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Compensation Interpretation Service, Benefit Series, Vol. 11, No. 11, Nov. 1948, pp. 19–21; Decision of New Jersey Board of Review, May 31, 1949, No. Br–15077–C, Reported in Unemployment Compensation Interpretation Service, Benefit Series, Vol. 12, No. 10, October 1949, pp. 120–121.

[38] *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 122–124; *Bethlehem Steel Company* v. *New York State Labor Relations Board*, 330 U. S. 767, 774–777; *Plankinton Packing Co.* v. *Wisconsin Employment Relations Board*, 338 U. S. 953, reversing 255 Wis. 285, 38 N. W. 2d 688 (Wis. Sup. Ct.).

from the amount of back pay due. Each period of unemployment suffered by a worker reduces in a number of respects the amount he may thereafter recover. The insurance created by the Louisiana Unemployment Compensation Law is of a limited type, dependent for its future availability upon continued employment, and is exhaustible *pro tanto* by payment of benefits (Dart's, Sec. 4434.2 (b), (d) and 4434.3 (e), Appendix, 65, 66, 67, *infra*). The maximum an unemployed person can receive, in any benefit year, is 20 times his weekly benefit amount or one-third of his wages during the base period, whichever is less (Dart's, Sec. 4434.2 (d), Appendix, 66, *infra*), so that each weekly payment received by an unemployed person reduces *pro tanto* the amount of benefit payments which he would be entitled to receive should he again become unemployed during the benefit year. And since the period of unemployment is part of the "base period" during which the employee must be employed in order to draw future benefits he might not be able to draw any benefits for a period of time thereafter. Thus, under the Louisiana Law, an individual must have earned not less than thirty times his weekly benefit amount in his base period in order to be entitled to *any* benefits in the succeeding benefit year (Dart's Sec. 4434.3 (e), Appendix, 67, *infra*). If a period of unemployment following a discriminatory discharge continues throughout a whole calendar year, the individual would have no right to unemploy-

ment benefits for the following year. If it does not continue throughout a calendar year and the individual is able to draw additional benefits, the total amount he could draw would be lower because of the discharge, since the wages received during the base period afford the measure by which both the size of the weekly benefit payment and the maximum amount of benefits any individual may receive in any one year are computed (Dart's, Sec. 4434.2 (b) (d), Appendix, 65, 66, *infra*). In short each time that a worker, wrongfully discharged, is required to draw upon his unemployment compensation, he reduces the reserves otherwise available for a subsequent period of unemployment.

In addition, if the employer is permitted to deduct benefits from back pay, the employee's standing under the Federal Old Age and Survivors Insurance program would be prejudiced. The size of the retirement pensions and survivors benefits receivable by the employees or their survivors is directly dependent upon the total wages earned by the employees. Under this Court's decision in the *Nicrotko* case, *supra*, back pay is credited to the employee's social security account as wages. Hence, to the extent that the back pay award is reduced by the deduction of unemployment insurance benefits, the employee's social security account is impaired.

In sum, as we have shown, the Company's argument that the nondeduction of unemployment

compensation benefits results in making the employee more than whole is untenable. As the court pointed out in the *Marshall Field* case, 129 F. 2d 169, 172, "The mere fact that [recipients of back pay awards] may possibly receive more money for the period of their unemployment than they would have received if employed does not of itself affect the question." For this comparison overlooks the collateral losses which the dischargee may have suffered, which, if considered, would establish that the employee does not profit from the discharge. It overlooks also the fact that unemployment benefits are not necessarily retained by the employees, and, in any event, that the receipt of unemployment compensation is itself accompanied by collateral disadvantages to the employee.

The Board's loss of earnings test, which excludes both collateral losses and collateral benefits from computation thus does result in a measure of compensation which fairly approximates the losses directly attributable to the discharge. "Even in private litigation, the courts will not impose an absolute standard of accuracy. * * * Certainty as to the amount goes no further than to require a basis for a reasoned conclusion.'" *F. W. Woolworth* v. *National Labor Relations Board*, 121 F. 2d 658, 663 (C. A. 2). Since the Company "by its unlawful conduct, has made it

impossible to do more than approximate the conditions which would have prevailed in the absence of discrimination," (*Woolworth* case, *supra*), it is in no position to complain because, if some absolute measurement were possible, the ultimate total might have been found to be greater or less than that fixed by the Board's order.

C. THE BOARD'S ORDER IS NOT PUNITIVE

Finally, the Company argues that the Board's order, insofar as it fails to permit deduction of unemployment benefits, is "punitive." The court below apparently reached the same conclusion, for the sole support which it cited for its action in modifying the Board's order to permit such deduction was this Court's decision in *Republic Steel Corp.* v. *National Labor Relations Board*, *supra*.

The argument that non-deduction of unemployment benefits makes the Board's order punitive was flatly rejected by the Seventh Circuit in the *Marshall Field* case. As the court there stated (129 F. 2d, at 172, 173):

> The only substantial question in this case is whether the order penalizes the respondent. The Act is remedial, and the Board is without power to inflict a penalty upon an employer, even though it believes that such action would effectuate the purposes

of the Act. *Republic Steel Corp.* v. *National Labor Relations Board*, 311 U. S. 7.

* * * * *

* * * In private contract or tort cases involving loss of employment * * * the amount of damages recoverable is not affected by collateral benefits paid to the injured person. Yet in these cases, the award is not of punitive damages, but of compensatory damages, the purpose of which is to make the injured party whole. * * *

* * * * *

We hold that * * * the order was within the powers of the Board.

To argue that an award of back pay, undiminished by deduction of collateral benefits, is compensatory when made by a court or jury but punitive when made by the Board, is groundless on its face. As long as the remedy is designed to compensate the injured party in a measure approximating his loss, rather than to impose a burden on the wrongdoer without regard to the amount or character of loss inflicted, the remedy may not be said to be punitive.[59] "The fact that the Board may only have approximated its efforts to make the employees whole, * * * does not convert this reimbursement order into the imposition of a penalty" *Virginia Electric & Power Co.* v. *National Labor Relations Board*, 319 U. S. 533, 544.

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[59] 1 Am. Jur. 431, Actions, Sec. 39.

The courts have repeatedly been confronted with the question whether a statute which prescribes as compensation to an employee for wrongful discharge an amount arbitrary in character and larger than the wages which would have been earned during the period covered, is thereby made penal. In these cases the courts have pointed out the difficulty of measuring in terms of ordinary wages the total loss suffered by an employee who is left for a period of time without his usual source of income, and have held that a rate of recompense of double the amount of wages wrongfully withheld, or of a minimum of a month's wages without regard to how short a period the employee was out of work, was a reasonable method of compensating for the wrong, and did not constitute a penalty.[60] *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 583; *Cox* v. *Lykes Brothers*, 237 N. Y. 376, 379, 143 N. E. 226; *Calvin* v. *Huntley*, 178 Mass. 29, 32, 59 N. E. 435, 436; cf. *Robertson* v. *Argus Hosiery Mills, Inc.*, 121 F. 2d 285, 286 (C. A. 6), certiorari denied, 314 U. S. 681.

The decision of this Court in *Republic Steel Corp.* v. *National Labor Relations Board*, 311 U. S. 7, 13, does not support the view of the court

[60] "There are many cases in which a party injured is allowed to recover in a civil action double or treble damages. * * * It will hardly be claimed that these are penal actions requiring the application of different rules * * * from those that prevail in other actions for indemnity." *Stockwell* v. *United States*, 13 Wall. 531, 547. Compare *Crary* v. *Porter*, 157 F. 2d 410, 414 (C. A. 8).

below. Rather, in adopting the "earnings" test (see *supra*, p. 50), it supports the view of the Board and of the Court of Appeals in the *Marshall Field* case, *supra*. The *Republic Steel* case presented no question of deductibility of collateral benefits from back pay. Earnings and wilful losses were deducted under the terms of the Board's order from the sums to be paid to the employees. The Board, while deducting work relief earnings from the back pay due the discharged employees, ordered the employer to pay a sum equivalent to those earnings to the work relief agencies for whom the services had been performed. The Court held that since the order requiring such payments by the employer to the relief agencies was not designed to make employees whole for losses sustained by them as a result of the unlawful discharges, but to compensate the agencies for expenditures which but for the illegal discharge would not have been made, it was punitive and therefore exceeded the Board's powers under the Act. The Court said (311 U. S., at 13) the Board "has not been assigned a role in relation to losses conceived to have been sustained by communities or governments in connection with work relief projects."

The Board's order in the instant case, on the other hand, does not undertake to require payments by the employer to anyone other than the discharged employee. The measure of payment

required of the employer, as we have shown, is limited to the amount which the Board deems necessary to make employees whole; the order seeks to effectuate no policy other than compensation of discharged employees for wage losses they have suffered. The order reflects the Board's reasoned judgment that to permit the employer to deduct unemployment compensation benefits from the back pay due would defeat the policy of Congress in authorizing the back pay remedy. For reasons already stated we think that judgment was clearly one which the Board had authority to make.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be reversed, and the Board's order enforced without modification.

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NOVEMBER, 1950.

APPENDIX

The pertinent provisions of the National Labor Relations Act as amended by the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. III, 141, et seq.) are as follows:

> SEC. 10 (c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: * * *.
>
> * * * * *

The pertinent provisions of the Federal Employment Tax Act (53 Stat. 1387, 1388, 26 U. S. C. 1600–1601) are as follows:

> SEC. 1600. RATE OF TAX.
>
> Every employer (as defined in section 1607 (a)) shall pay for the calendar year 1939 and for each calendar year thereafter an excise tax, with respect to having individuals in his employ, equal to 3 per centum of the total wages (as defined in section 1607 (b)) paid by him during the calendar year with respect to employment (as defined in section 1607 (c)) after December 31, 1938.
>
> SEC. 1601. CREDITS AGAINST TAX.
>
> (a) CONTRIBUTIONS TO STATE UNEMPLOYMENT FUNDS.—
>
> (1) The taxpayer may, to the extent provided in this subsection and subsection (c), credit against the tax imposed by section 1600 the amount of contributions paid by him into an unemployment fund maintained during the taxable year under the unemployment compensation law of a State which is certified for the taxable year as provided in section 1603.
>
> * * * * *
>
> (c) LIMIT ON TOTAL CREDITS.—The total credits allowed to a taxpayer under this subchapter shall not exceed 90 per centum of the tax against which such credits are allowable.

The pertinent portions of the Louisiana Unemployment Compensation Law (Dart's La. Gen. Stat., 1949, § 4434.1 et seq.) are as follows:

> 4434.1. Declaration of state public policy.—As a guide to the interpretation

and application of this act, the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals and welfare of the people of this state. Unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state require the enactment of this measure, for the compulsory setting aside of unemployment reserves to be used for the benefit of unemployed persons. [Acts 1936, No. 97, § 1; 1938, No. 164, § 2.]

4434.2. Payment of benefits.—(a) Payment of Benefits. All benefits provided herein shall be payable from the fund. All benefits shall be paid through employment offices, in accordance with such regulations as the administrator may prescribe.

(b) Weekly Benefit Amount.

(1) Weekly Benefit Amount. An individual's weekly benefit amount shall be an amount equal to $\frac{1}{26}$ of his total wages for insured work paid during that quarter of his base period in which such total wages were highest, except that if such amount is more than $25.00, the weekly benefit amount shall be deemed to be $25.00, or if less than $5.00 shall be deemed to be $5.00, and if not a multiple of $1.00, shall be computed to the next higher multiple of $1.00.

(2) Weekly Benefit. Each eligible individual who is employed [unemployed] in any week shall be paid with respect to such week a benefit in an amount equal to his weekly benefit amount less than part of the wages (if any) payable to him with respect to such week which is in excess of $3.00. Such benefit, if not a multiple of $1.00, shall be computed to the next higher multiple of $1.00

(c) Payment of Benefits for a Fractional Week. Notwithstanding any other provisions of this act the administrator may by regulation prescribe that the existence of unemployment, eligibility for benefits and the amount of benefits payable shall be determined, in the case of any otherwise eligible claimant who, within a week of unemployment is separated from, or secures, work on a regular attachment basis, for that portion of the week occurring before or after such separation from or securing of work, provided such regulations are reasonably calculated to secure, general results substantially similar to

those provided by this act with respect to weeks of unemployment.

(d) Duration of Benefits. Any otherwise eligible individual shall be entitled during any benefit year to a total amount of benefits equal to whichever is the lesser of (1) twenty times his weekly benefit amount, and (2) one-third of his wages for insured work paid during the base period; provided that such total amount of benefits, if not a multiple of $1.00, shall be computed to the next higher multiple of $1.00. For the purposes of this section, wages shall be counted as "wages for insured work" for benefit the purposes with respect to any benefit year only if such benefit year begins subsequent to the date on which the employing unit by whom such wages were paid has satisfied the condition of section 18 (f) [§ 4434.18] or section 7 (e) [§ 4434.7] with respect to becoming an employer.

* * * * *

4424.3. Benefit eligibility conditions.—An unemployed individual shall be eligible to receive benefits with respect to any week only if the administrator finds that:

(a) He has made a claim for benefits in accordance with the provisions of section 5 (a) [§ 4434.5] of this act.

(b) He has registered for work at, and thereafter has continued to report at, an employment office in accordance with such regulations as the administrator may prescribe, except that the administrator may, by regulation, waive or alter either or both of the requirements of this subsection as to such types of cases or situations with respect to which he finds that compliance with such requirements would be oppres-

sive, or would be inconsistent with the purposes of this act; provided that no such regulation shall conflict with section 2 (a) [§ 4434.2] of this act.

(c) He is able to work, and is available for work.

(d) He has been unemployed for a waiting period of one week. No week shall be counted as a week of unemployment for the purpose of this subsection;

(1) Unless it occurs within the benefit year which includes the week with respect to which he claims payment of benefits, provided that this requirement shall not interrupt the payment of benefits for consecutive weeks of unemployment.

(2) If benefits have been paid with respect thereto.

(3) Unless the individual was eligible for benefits with respect thereto as provided in section[s] 3 and 4 [§§ 4434.3, 4434.4] of this act, except for the requirements of this subsection and of subsection (e) of section 4 [§ 4434.4].

(e) He has during his base period been paid wages for insured work equal to not less than thirty times his weekly benefit amount. For the purposes of this subsection, wages shall be counted as "wages for insured work" for benefit purposes with respect to any benefit year only if such benefit year begins subsequent to the date on which the employing unit by which such wages were paid has satisfied the conditions of section 18 (f) [§ 4434.18] of section 7 (e) [§ 4434.7] with respect to becoming an employer. [Acts 1936, No. 97, § 3; 1938, No. 464, § 2; 1940, No. 11, § 3; 1944, No. 160, § 1.]

* * * * *

4434.6. Contributions.—* * *.

(c) Contribution Rates Based on Ratio of Reserve to Pay-Rolls.

(1) The administrator shall prepare and maintain an experience-rating record for each employer, and shall credit such record with all the contributions paid by him with respect to wages paid for the calendar quarter beginning October 1, 1941 and for each calendar quarter thereafter. Nothing in this act shall be construed to grant any employer or individuals performing services for him prior claims or rights to amounts paid by the employer into the fund. The administrator shall terminate the experience-rating record of an employer who has ceased to be subject to the Louisiana Unemployment Compensation Law, or may do so provided the employer has had no employment in this state for a period of three consecutive calendar years. Benefits accruing and paid on and after October 1, 1941 to an individual in accordance with the provisions of the Louisiana Unemployment Compensation Law shall be charged against the experience-rating records of his base-period employers. The amount so chargeable against each base period employer's experience-rating record shall bear the same ration to the total benefits paid to an individual as the base-period wages paid to the individual by such employer bear to the total amount of base-period wages paid to the individual by all his base-period employers; provided, however, that all such charges may be computed to the nearest multiple of one dollar ($1.00).

(2) The standard rate of contribution payable by each employer shall be 2.7 per centum, except as hereinafter provided.

(3) No employer's rate shall be varied from 2.7 per centum for any experience-rating year unless his experience-rating record could have been charged with benefits throughout the 36-consecutive-calendar-month period ending on the computation date. An employer's record shall in no event be deemed to have been chargeable with benefits during any period prior to the first day of the calendar quarter which precedes the quarter within which he made his first contribution payment.

(4) The administrator shall for the experience-rating year beginning October 1, 1945, and for each experience-rating year thereafter determine the contribution rate of each employer who has met the requirements specified in paragraph (3) of this subsection on the basis of his experience-rating record, in the following manner:

(I) If the total of an employer's contributions paid on or before April 25, immediately succeeding the computation date with respect to wages paid by him on or prior to the computation date, exceeds the total benefits which were chargeable to his experience-rating record, and were paid on or before such April 25, with respect to weeks of unemployment beginning prior to the computation date, his contribution rates for the ensuing experience-rating years, subject to suspension as hereinafter provided in subsection (c) (6), shall be as follows:

* * * * *

(C) With respect to the experience-rating year beginning October 1, 1947:

(a) 2.7 per centum if such excess is less than 4.90 per centum of his average annual pay-roll;

(b) 2.4 per centum if such excess equals or exceeds 4.90 per centum but is less than 5.44 per centum of his annual pay-roll;

(c) 2.1 per centum if such excess equals or exceeds 5.44 per centum but is less than 5.98 per centum of his average annual pay-roll;

(d) 1.8 per centum if such excess equals or exceeds 5.98 per centum but is less than 6.52 per centum of his average annual pay-roll;

(e) 1.5 per centum if such excess equals or exceeds 6.52 per centum but is less than 7.06 per centum of his average annual pay-roll;

(f) 1.2 per centum if such excess equals or exceeds 7.06 per centum but is less than 7.60 per centum of his average annual pay-roll;

(g) .9 per centum if such excess equals or exceeds 7.60 per centum of his average annual pay-roll.

* * * * *

(6) No employer's rate shall be varied from the 2.7 per centum rate during any calendar year unless, as of the last day of the preceding calendar year, the total amount available for benefits in the Louisiana Unemployment Compensation Fund equals or exceeds 1.5 per centum of the total pay rolls subject to contributions under the Louisiana Unemployment Compensation Law as ascertained from the records on file with the division of employment security for the last five consecutive calendar years ending on the last day of the calendar year as above set forth, or thirty-five million dollars ($35,000,000.00), whichever is the greater.

* * * * *

(8) The Administrator shall, not later than October 1 of each year, render a statement to each employer of benefits paid each individual and charged to such employers' experience-rating record for the twelve-month period ending the previous June 30. Any such benefit charges shall be conclusive and binding upon the employer unless he files an application for review of such charges, setting forth his reasons therefor within 30 days after the mailing of such notice to his last-known address, or in the absence of mailing within 25 days after the delivery of such notice.

* * * * *

4434.8. Unemployment compensation fund.—(a) Establishment and Control. There is hereby established as a special fund, separate and apart from all public moneys or funds of this state, an unemployment compensation fund, which shall be administered by the administrator exclusively for the purpose of this act. This fund shall consist of (1) all contributions collected pursuant to this act, together with any interest thereon collected pursuant to section 13 [§ 4434.13] of this act; (2) all fines and penalties collected pursuant to the provisions of this act; (3) interest earned upon any moneys in the fund; (4) any property or securities acquired through the use of moneys belonging to the fund; (5) all earnings of such property or securities; and (6) all other moneys received for the fund from any other source. All moneys in the fund shall be mingled and undivided.

(b) Accounts and Deposits. The administrator shall maintain within the fund three separate accounts: (1) a clearing

account, (2) an unemployment trust fund account, and (3) a benefit account. All moneys payable to the fund, upon receipt thereof by the administrator, shall be immediately deposited in the clearing account. All moneys in the clearing account, after clearance thereof, shall, except as herein otherwise provided, be deposited immediately with the secretary of the treasury of the United States of America to the credit of the account of this state in the unemployment trust fund, established and maintained pursuant to section 904 [9A, F. C. A., tit. 42, § 904] of the Social Security Act, as amended, any provisions of law in this state relating to the deposit, administration, release, or disbursement of moneys in the possession or custody of this state to the contrary notwithstanding. Refunds payable pursuant to section 13 [§ 4434.13] and 18 (g) (6) (E) [§ 4434.18] of this act may be paid from the clearing account or the benefit account. The benefit account shall consist of all moneys requisitioned from this state's account in the unemployment trust fund in the United States treasury. Except as herein otherwise provided, moneys in the clearing and benefit accounts may be deposited in any depository bank in which general funds of the state may be deposited, but no public deposit insurance charge or premium shall be paid out of the fund. Moneys in the clearing and benefit accounts shall not be commingled with other state funds, but shall be maintained in separate accounts on the books of the depository bank. Such money shall be secured by the depository bank to the same extent and in the same manner as required

by the general depository law of this state; and collateral pledged for this purpose shall be kept separate and distinct from any collateral pledged to secure other funds of the state. The administrator shall give a bond conditioned upon the faithful performance of his duties with respect to the fund in an amount not to exceed $25,000. The bond shall be approved as to legality and form by the attorney-general of this state. All sums recovered for losses sustained by the fund shall be deposited therein.

* * * * *

4434.13. Collection of contributions.—

* * *

(f) Refunds and Adjustments.

(1) If not later than three years after the date of payment of any amount as contributions, interest, or penalties, an employing unit which made such payment shall make application for an adjustment thereof in connection with subsequent contribution payments, or for a refund thereof because such adjustment can not be made, and the administrator shall determine that such contributions or interest or penalties or any portion thereof were erroneously collected, the administrator shall allow such employing unit to make an adjustment thereof, without paying interest upon the same, in connection with subsequent contribution payments by it, or if such adjustment cannot be made the administrator shall refund said amount, without interest upon same from the unemployment compensation fund. For like cause and within the same period, adjustment or refund may be so made on the administrator's own initiative.

* * * * *

4434.18 Definitions.—* * *

(o) "Base period" means the first four of the last five completed calendar quarters immediately preceding the first day of an individual's benefit year.

(p) "Benefit year" with respect to any individual means the one-year period beginning with the first day of the first week with respect to which the individual first files a claim for benefits in accordance with section 3 (a) [§ 4434.3] of this act, and thereafter the one-year period beginning with the first day of the first week with respect to which the individual next files a claim for benefits after the termination of his last preceding benefit year; provided, that at the time of filing such a claim the individual has been paid the wages for insured work required under section 3 (c) [§ 4434.3] of this Act.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 122

NATIONAL LABOR RELATIONS BOARD,
Petitioner

versus

GULLETT GIN COMPANY, INC.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR GULLETT GIN COMPANY, INC., RESPONDENT

BALDWIN, HASPEL & MOLONY,
LAWRENCE A. MOLONY,
ROBERT R. RAINOLD,
CONRAD MEYER III.

HAUSER PRINTING CO., INC., NEW ORLEANS

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, to which this writ of certiorari has been issued, is reported at 179 Fed. (2d) 499. The findings of fact, conclusions of law, and Order of the National Labor Relations Board (R. 30-66) are reported at 83 N. L. R. B. 1.

JURISDICTION

This matter is before the Court on writ of certiorari to the United States Court of Appeals for the Fifth Circuit. The jurisdiction of this Court rests on Section 10(e) of the National Labor Relations Act, as amended, and 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

The Statement of the Case, as recited in the brief filed herein by the Board (pages 2-5 of the Board's brief), is a correct statement of the facts of the case. Respondent desires, however, to amplify that statement in the following particular.

Respondent calls to the attention of this Court the fact that the discharge of the employees involved in this case, although found by the Board and the Court of Appeals to be "discriminatory", as that term is used in the Act, was nevertheless a highly **technical** discriminatory discharge. The facts of the case, as shown in the Intermediate Report of the Trial Examiner, which were adopted by the Board in its Decision and Order, establish that the Respondent Company discharged the employees in a *bona fide* belief that it could not grant a wage increase to the employees at a time when a representation election was pending before the Board. In other words, the holding of the Board and the Court of Appeals that the Respondent Company discriminatorily discharged certain employees comes in a case in which the employer was sincerely, but erroneously, attempting to avoid an unfair labor practice.

The decision of the Court of Appeals demonstrates this in the following language from the opinion:

"Unlike the situation obtaining in the usual case of claimed discriminatory discharges, there is no claim here that these persons were discharged on account of their activity in favor of or against a particular union or labor organization which had organized, or was campaigning to organize, the plant."

* * * * *

"The record shows without conflict that the meeting was arranged for and held in the shop; that there was a discussion at the meeting; that **Wallace, for the respondent, patiently and carefully explained that he could do nothing, on account of the pending election for representation, about the demand**; and that instead of accepting this statement without demur, the employees persisted in trying to further discuss the question with him."

* * * * *

"The evidence makes it perfectly clear that there was no difference or dispute, between the employer and the discharged employees, as to what union or organization they had joined or should join, or should represent them. Nothing in the whole discussion remotely points to a difference between them arising out of, or traceable to questions of joining or not joining any particular labor organization. Certainly they were not discharged because they demanded or showed preference for one organization over the other or for the purpose of discouraging membership in any." (Emphasis added).

The above amplification of the Statement of the Case, as found in the brief filed herein by the Board, is offered to show the technical nature of the "discriminatory discharge", and particularly to emphasize

the fact that there was nothing in the conduct of the representatives of Respondent to warrant any attempt by the Board to award punitive or penal damages against Respondent.

QUESTION PRESENTED

The question presented on this writ of certiorari is whether the Gullett Gin Company, Inc., Respondent, in making whole certain employees for loss of earnings resulting from their discriminatory discharge, shall be entitled to deduct from their back pay such sums of money as the employees received from the Louisiana Unemployment Compensation Fund during the period of their discharge.

The United States Court of Appeals for the Fifth Circuit has decided the above question in favor of Respondent, and the National Labor Relations Board has petitioned this Court to review that decision of the Court of Appeals.

SUMMARY OF ARGUMENT

In this brief, Respondent will advance the arguments:

1. That the Board is without authority to punish or penalize an employer for a violation of the Act; that in cases involving discharged employees, the Board is limited to making the employees whole. *N. L. R. B. v. Fansteel Metallurgical Corp.*, 306 U.S. 240; *Consolidated Edison Co. v. N. L. R. B.*, 305 U.S. 197; *Republic Steel Corp. v. N. L. R. B.*, 311 U.S. 7; *Social Security Board v. Nierotko*, 327 U.S. 358.

II) That the rule regarding unemployment compensation benefits, adopted by the Board, makes a discharged employee more than whole, and is contrary to public policy.

III) That the rule adopted by the Board operates as an unjustified penalty on an employer. *Louisiana Unemployment Compensation Act*, La. Act 97 of 1936, as amended; Dart's, Louisiana Statutes, §§ 4434. 1 *et seq.* *Republic Steel Corp. v. N. L. R. B.*, *supra*; *Phelps Dodge Corp. v. N. L. R. B.*, 313 U.S. 177.

ARGUMENT

I.

IN FRAMING A BACK PAY AWARD, THE BOARD IS LIMITED TO MAKING AN EMPLOYEE WHOLE FOR HIS LOSS OF EARNINGS.

Section 10(c) of the National Labor Relations Act, as amended, provides in part that in those cases in which the employer has committed an unfair labor practice, the Board shall have authority to order an employer "to take such affirmative action including reinstatement of employees with or without back pay as will effectuate the policies of this Act." The policies of the Act, as found in Section 1, are (a) to encourage the practice and procedure of collective bargaining and (b) to protect the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing.

This Court has held in several decisions that the National Labor Relations Board does not have the au-

thority, under the guise of effectuating the policies of the Act, to punish or penalize an employer for the commission of an unfair labor practice. *N. L. R. B. vs. Fansteel Metallurgical Corp.*, 306 U.S. 240, 83 L. Ed. 627 (1939); *Consolidated Edison Co. vs. N. L. R. B.*, 305 U.S. 197, 83 L. Ed. 126 (1938). This Court has held that when the Board has required an employer to reinstate a discriminatorily discharged employee with full seniority and other rights, and with back pay for the period of his discharge, the employer's liability or responsibility to that employee is at an end. *Republic Steel Corp. vs. N. L. R. B.*, 311 U.S. 7, 85 L. Ed. 6 (1940).

In the *Republic Steel* case, which will be discussed further *infra*, this Court had for consideration a problem involving a back pay order of the Board. In discussing the authority of the Board with regard to back pay orders, the Court made the following observation:

> "The Act is essentially remedial. It does not carry a penal program declaring the described unfair labor practices to be crimes. The Act does not prescribe penalties or fines in vindication of public rights or provide indemnity against community losses as distinguished from the protection and compensation of employees. Had Congress been intent upon such a program, we cannot doubt that Congress would have expressed its intent and would itself have defined its retributive scheme."

We also call to the attention of the Court its decision in *Social Security Board vs. Nierotko*, 327 U.S. 358, 90 L. Ed. 718 (1946), in which the Court made the following observation regarding back pay awards of the National labor Relations Board:

"Under Section 10(c) of the Labor Act, the Labor Board acts for the public to vindicate the prohibitions of the Labor Act against unfair labor practices . . . and to protect the right of employees to self-organization which is declared by Section 9, 29 U.S.C.A. sec. 157, 9 F.C.A. title 29, section 157. It is also true that in requiring reparation to the employee through 'back pay' reparation is based upon the loss of wages which the employee has suffered from the employer's wrong. 'Back pay' is not a fine or penalty imposed upon the employer by the Board. Reinstatement and 'back pay' are for the 'protection of the employees in the redress of their grievances' to make them 'whole'. . . . "

II.

BY REQUIRING RESPONDENT COMPANY TO PAY TO ITS DISCHARGED EMPLOYEES A SUM OF MONEY EQUAL TO WHAT THEY WOULD HAVE EARNED DURING THE PERIOD OF THEIR DISCHARGE AND BY REFUSING TO PERMIT RESPONDENT COMPANY TO DEDUCT FROM THESE SUMS OF MONEY THE AMOUNTS OF MONEY WHICH THESE EMPLOYEES RECEIVED FROM THE LOUISIANA UNEMPLOYMENT COMPENSATION FUND DURING THE PERIOD OF THEIR DISCHARGE, THE BOARD IS MAKING THESE EMPLOYEES MORE THAN WHOLE.

As shown in Section I of this Argument, the purpose of the back pay award is to make an employee whole for his loss of wages during the period of his discharge. State Unemployment Compensation benefits are similarly intended to compensate an employee for lost

wages. Hence, to the extent that a back-pay claimant has received such Unemployment Compensation benefits, he has already been made partially whole. These benefits of the Unemployment Compensation Fund flow inevitably and directly from employment. The fund is financed exclusively by a tax on employers. An employee is entitled to these benefits from the fund by virtue of the fact that he had been employed and has presently lost his job and his wages.

We think it readily discernible that by refusing to permit Respondent to deduct from the amount due to its discharged employees a sum of money equal to that which those employees received from the State Unemployment Compensation Fund, the Board is making the employees concerned more than whole. Stated simply, the Board is telling Respondent that for the period of the discharge, Respondent must pay to its employees X dollars representing the loss of earnings of those employees; during the same period of unemployment, and **because of** the same period of unemployment, these employees have received Y dollars. Thus, these employees, under the Board's theory, would receive the sum of X plus Y dollars for a period in which they normally were entitled to only X dollars. Of course, these employees have performed no productive work whatsoever to receive either the X dollars or the Y dollars during this period.

Such a ruling by the Board will encourage idleness and the prolongation of labor disputes and is strongly contrary to public policy. If a back pay claimant actively seeks employment and finds a job, his interim earnings will be deducted from the back pay award; however, applying the rule of the Board, if he is idle

and draws Unemployment Compensation benefits then this is not deducted from the back pay award. **The result is that a back pay claimant makes more money by being idle than he would make either by working for his former employer or by working for another employer.** Such a result cannot be considered socially and economically acceptable.

The Board makes the interesting contention that its present rule which makes the employee whole for loss of wages, without consideration of the unemployment compensation benefits which he may have received, does **not** make the employee more than whole for the reason that the employee may have suffered some collateral losses during his period of unemployment. The Board states that since it does not consider collateral losses, it need not consider collateral benefits, such as "home relief, union relief, veterans' disability compensation or unemployment compensation funds." (See pp. 29-30 of Board's brief).

The short answer to this argument of the Board is that Respondent is not asking for a deduction from the back pay award because of home relief, union relief, or veteran's disability compensation benefits—which may truly be termed "collateral benefits". Respondent has raised in this case solely the question of unemployment compensation payments which are a **direct** benefit from the employer. The Board has anticipated Respondent's reply and makes the further argument that since the employee actually receives his unemployment compensation benefits from the state, it is a collateral benefit, not a direct one. But in advancing this argument, the Board has shut its eyes to the facts as that the Louisiana Unemployment Compensation Fund is a fund

built up solely by the employers of that state, b) that although the taxes paid by all employers are commingled, a separate account is kept for each employer showing the taxes paid in by it and the payments made out of the fund to its employees; c) that the employer's tax rate is affected by the benefits paid out of the fund to its employees, and d) that the purpose of the fund is to alleviate the effects of unemployment upon employees, regardless of whether the unemployment is caused by a shortage of work or an unfair labor practice. We submit most earnestly that these facts establish that unemployment compensation benefits are a **direct** benefit to employees—not collateral.

Actually, a discharged employee is treated with ample generosity and fairness under the Board's present rule regarding interim earnings. The Court will remember that in *Republic Steel Corp. vs. N. L. R. B.*, *supra*, it was held that the employer was entitled to deduct from a back pay award not only such sums of money as the employee had earned during his period of discharge, but also such sums of money which the employee had "wilfully refused to earn". As a result of this case, the Board established a rule that states that where an employee who has been discriminatorily discharged registers for employment with the United States Employment Service, or a similar state agency, it is **conclusively** presumed that the employee has made all reasonable efforts to obtain interim employment. *Ohio Public Service Co.*, 52 N.L.R.B. 725 (1943); *Harvest Queen Mill & Elevator Co.*, 90 N.L.R.B. No. 32 (1950). Although this ruling of the Board is not presently at issue in the instant case, it is mentioned here to show that while the Board speaks of the collateral losses which an employee may suffer during the period

of discharge, the Board itself nevertheless gives that employee the benefit of a **conclusive** presumption regarding back pay, which should be of great benefit to the employee. In fact, this rule of the Board might be considered a collateral gain by the employee, because it would seem obvious that mere registration with an employment service, without additional attempts to secure employment through other means, would not constitute a serious, *bona fide* effort to locate other employment.

III.

BY REFUSING TO PERMIT AN EMPLOYER TO DEDUCT FROM A BACK PAY AWARD SUCH AMOUNTS OF MONEY AS THE EMPLOYEES HAVE RECEIVED FROM THE LOUISIANA UNEMPLOYMENT COMPENSATION FUND, THE BOARD IS PLACING A DIRECT, UNWARRANTED PENALTY UPON THE EMPLOYER.

To appreciate fully this part of Respondent's argument, it is necessary that the Court have an understanding of the operations of the Louisiana Unemployment Compensation Act, particularly as regards the method of computing the tax upon employers. Commencing at page 63 of the brief filed herein by the Board, there are set forth certain pertinent portions of the Louisiana Unemployment Compensation Law. Since these portions of the Law are fully set forth in the brief of the Board, Respondent will not repeat them herein. It should be noted at the outset, as shown in the Statement of Public Policy of the Law, (see page 64 of the Board's brief) that the policy of the Louisiana Unemployment Compensation Law is to mitigate the menace to the health and welfare of the people of that

State arising from unemployment. To accomplish this purpose, the Act provides that employees who are unemployed, and who can meet certain requirements as set forth in the Act, are entitled to draw Unemployment Compensation benefits from a fund which is raised by a tax upon the employers within the State. The same act which sets forth the benefits to which unemployed workers are entitled also sets forth the method of raising the funds to provide these benefits. Thus in the stated policy of the Act, we find the following language:

> "The achievement of social security requires protection against this greatest hazard of our economic life [unemployment]. This can be provided by encouraging employers to provide more stable employment and **by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment,** . . . " (Emphasis added.)

Commencing on page 68 of the Board's brief, there are found certain provisions of the Louisiana law which show the method of determining the rate of taxation to be paid by employers for the purpose of maintaining the Unemployment Compensation Fund. All employers within the State are required to pay a tax, called a "contribution" in the Law, which tax is a certain percentage of the employer's actual pay roll for each calendar quarter of the year. The rate of tax is fixed in the Act at 2.7 per centum, unless the employer can qualify for a reduced rate of taxation by virtue of having a favorable "experience-rating record". This experience-rating record is determined by the formula set forth in the Act. Basically, the formula for determining this experience-rating record is one which

considers the total amount of tax paid into the fund by an employer, the total amount of benefits paid out of the fund which are attributable to former employees of that same employer, and the size of the employer's average annual pay roll. Exactly, the formula works in the following fashion. From the total amount of tax paid into the fund by a given employer, there is deducted the total amount of benefits paid out of the fund, and charged to that employer's account—this remainder is entitled the "excess". This "excess" is then divided by the average of the employer's payroll over a period of three years, resulting in a certain quotient. This resulting quotient is then applied to the table set forth in the law, (see pages 69-70 of the Board's brief), and depending on the size of this quotient, the employer's rate of taxation may be reduced from 2.7 per centum down to 0,9 per centum, or to some percentage lying between these two rates.

Thus, the more benefits paid out of the fund and charged to a particular employer the smaller will be the excess of his contributions over his benefits charged. The smaller this excess is, the smaller the resulting quotient is, and then by applying the smaller quotient to the table, the higher is that particular employer's rate of taxation. It is particularly important to notice that by following this formula, a benefit paid out of the fund and charged to a particular employer becomes a permanent part of that employer's experience-rating record. It does not terminate after any given number of years. It may happen that in any given year a certain series of benefit charges will not be sufficient to change the employer's experience-rating record so as to require him to pay a higher rate of taxation than he normally would have; however, that particular series

of benefit charges remains a part of his record and will be a factor in the computation of his tax each and every year in the future. It is obvious, that although the particular benefit charges may not change the employer's tax in a given year, over a period of many years, there will inevitably come a time in which those benefit charges will make the difference between the employer having a higher or a lower rate of taxation for the ensuing year.

Applying the rules of the Louisiana Unemployment Compensation Law to the facts of the instant case, it can be seen that the benefit charges, made against the account of Respondent and resulting from such sums of money as the employees involved in this case have received as benefits from the Louisiana Unemployment Compensation Fund, have become a permanent part of Respondent's experience-rating record as kept by the Administrator of the Louisiana Fund. Whether these specific payments from the fund to the employees involved in this case have actually increased Respondent's rate of contribution or not, is a matter which, we submit, is not particularly relevant to our case. The fact is that these payments do become a part of Respondent's experience-rating record and do affect Respondent's rate of contribution for all future years. Whether these particular payments were sufficient to change Respondent's rate of taxation for any given year in the past, or will change Respondent's rate in any ensuing year, does not affect the merits of the case. The foregoing review of the method of operation of the law shows clearly that these payments **will** have a very substantial effect upon Respondent's rating record, and will affect that record to the detriment of Respondent, some time in the past, the present, or the future,—and will

have an effect upon that record in each and every ensuing year. Of course, when an increased rate of taxation of only a small percentage is applied to an annual payroll of some two hundred employees (R. 38), it can be seen that the resulting tax increase will be substantial. Although the record does not show what Respondent's annual payroll totals, it can be seen that even if all of the two hundred employees received only the Wage-Hour Law minimum of seventy-five cents per hour, the annual payroll would be in excess of three hundred thousand dollars.

We submit that a rule of the National Labor Relations Board which requires Respondent to obtain no credit, or deduction, from a back pay award, in an amount equal to that which the discharged employees have received from the Louisiana Unemployment Compensation Fund works a direct and unnecessary penalty upon Respondent. Not only does the employer, under the Board's rule, make these employees more than whole for any loss of wages which they suffered during the period of their unemployment, but the employer is also made subject to an increased rate of taxation under the Louisiana Unemployment Compensation Law.

In *Republic Steel Corporation vs. N. L. R. B.*, *supra*, this Court has stated the rule that the Labor Board is without authority to penalize or punish an employer for an unfair labor practice. The facts of that case were that the Board had ordered the Company to offer reinstatement to certain employees, and to make these employees whole for any loss of wages which the employees suffered during the period of their discharge. The Board's Order permitted the employer to deduct from the back-pay award such sums of money as the

employees had received from any state, federal, or county agencies growing out of "work relief projects". However, the Board's Order further required that the employer reimburse these state, federal and county agencies in such sums of money as the employer's discharged employees had received from these "work relief projects" during the period of their unemployment. This Court reversed the Order of the Board on the question of paying money back to the governmental agencies, for the reason that the Board's authority was limited to making the discharged employees whole, and the Board was not authorized to inflict penalties upon the employer.

After holding that the powers of the Labor Board were limited to making employees whole, this Court went on to say:

> "As the sole basis for the claim of authority to go further and to demand payments to governments, the Board relies on the language of § 10(c), 29 USCA § 160(c) which provides that if upon evidence the Board finds that the person against whom the complaint is lodged has engaged in an unfair labor practice, the Board shall issue an order—'requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."
>
> * * * * *
>
> "To go further and to require the employer to pay to governments what they have paid to employees for services rendered to them is an exaction neither to make the employees whole nor to assure they can bargain collectively with the employer through representatives of their own

choice. We find no warrant in the policies of the Act for such an exaction."

In *Phelps Dodge Corp. vs. N. L. R. B.*, 313 U.S. 177, 85 L. Ed. 1271 (1941), this Court considered the question of whether there should be deducted from a back pay award ordered by the Board such sums of money which the employees "failed without excuse to earn" during the period of their discharge, the Board had refused to include such a deduction in its Order, but the Court of Appeals for the Second Circuit had amended the Board's Order so as to provide such a deduction. The Board then petitioned, and obtained a writ of certiorari from this Court to review that decision of the Court of Appeal. This Court held that to permit employees who were discharged to refuse wilfully to obtain other employment during their period of discharge was unwholesome. Accordingly, it affirmed the decision of the Court of Appeal. We submit the following language from the opinion of the Court as being pertinent:

> "As part of its remedial action against the unfair labor practices, the Board ordered that workers who had been denied employment be made whole for their loss of pay. In specific terms, the Board ordered payment to the men of a sum equal to what they normally would have earned from the date of the discrimination to the time of employment less their earnings during this period. The court below added a further deduction of amounts which the workers 'failed without excuse to earn,' and the Board here challenges this modification.
>
> "Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces. Since only actual losses

> should be made good, it seems fair that deductions should be made not only for actual earnings by the worker but also for losses which he willfully incurred."

It was on the reasoning of the *Republic Steel* case, quoted above, that the Court of Appeals for the Fifth Circuit modified the Order of the Board in this case to permit Respondent to deduct unemployment compensation benefits from the back pay award. Respondent submits that the analogy between that case and the instant case is very close, that in both cases the Board sought not only to make the employees whole, but also to inflict an unwarranted penalty on the employer,—and that the Board is without authority to impose penalties in the form of punitive awards of back pay.

CONCLUSION

Respondent submits that the issue in this case is very simple and easy of decision. Respondent's arguments can be summed up shortly in this fashion:

To require an employer to make whole an employee who has been discriminatorily discharged by paying the employee wages for work not performed may be said to be an indirect, and justified, penalty against the employer for an unlawful act. We have no quarrel with this proposition. But when the National Labor Relations Board, by its Order, makes an employee more than whole, and in doing so subjects an employer to a probable higher rate of taxation under a state unemployment compensation law, we submit that the Board has placed a directly penalty upon that employer—a penalty which is not only unjustified in principle, but one which is beyond the scope of the law.

For the reasons stated heretofore, it is respectfully submitted that the judgment of the Court of Appeals for the Fifth Circuit should be affirmed.

BALDWIN, HASPEL & MOLONY,
LAWRENCE A. MOLONY,
ROBERT R. RAINOLD,
CONRAD MEYER III.

New Orleans, Louisiana
November, 1950.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 109

MARTON L. WHELCHEL, PETITIONER,

vs.

A. McDONALD, WARDEN OF THE FEDERAL CORRECTIONAL INSTITUTION AT TEXARKANA, TEXAS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 23, 1950.

CERTIORARI GRANTED JUNE 5, 1950.

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